Washington University in St. Louis
SCHOOL OF LAW

April 12, 2021

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Derek Story-Lee

Dear Judge Davis:

I write to recommend my student, Derek Lee, for a clerkship in your chambers. I was fortunate to get to know Derek as a student in my Property Law class in the fall of 2020. Not only did Derek do well in the class, but he impressed me with his analytical reasoning skills. I know he would be an asset to your chambers.

Derek has given a lot of thought to the idea of a clerkship. As he describes it, clerking – and specifically "learning from a judge" – is "the single best learning experience I can imagine for improving the craft of practicing law. From that position I would be able to see not only how a court functions, but how judges think and reason through problems." Derek hopes to begin his career in private practice but eventually transition into public interest work of some type, and he views clerking as an important part of his public service goals.

In Property Law, Derek participated in class often. He performed well when cold-called, and when volunteering to contribute, his comments were thoughtful and clear. He often attended office hours, and his intellectual curiosity was apparent. He was consistently interested in the course material for its own sake, rather than only for exam preparation purposes.

It was not a surprise when Derek received the highest grade in my class on the final exam. He received the highest scores in the class on both questions involving elements of policy analysis, and received nearly the highest score on the doctrinal issue-spotter. His exam was comprehensive and detailed.

His performance in the class was more impressive when the difficult circumstances of the Fall 2020 semester are considered: we held class in a hybrid form (where some students were in person and others on Zoom) most days, but were sometimes all on Zoom. Under these circumstances, he adjusted very well to the law school environment and has excelled in his classes.

Please let me know if you need any more information about Derek. I can be reached by email at rsachs@wustl.edu or phone at (314)-935-8557.

Best,

/s/

Rachel Sachs
Associate Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

March 28, 2022

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Derek Story-Lee

Dear Judge Davis:

Derek Lee was a student in my Jurisprudence Seminar last fall, and in torts the year before. In both courses, he was an outstanding student, with a penetrating, quick intellect and enthusiasm for law.

The Jurisprudence Seminar is a survey course that covers topics from natural law, to liberal theory (Locke, Mill, Rawls), to the rule of law, to law and economics, and other theoretical perspectives issues in law. The class is known to be challenging and the students who enroll are among our top students. They are required to write four papers during the semester, which I grade anonymously. Mr. Lee's papers were original, sophisticated, and thoughtful. These qualities are reflected in comments I wrote at the top of various papers: "Very smart and interesting essay!" "Well written and argued!" "Ambitious." Mr. Lee received one of the highest grade in a class with many of our best students. In addition, he made a major contribution to the class discussion because he was willing to express views and defend positions that were not always shared by the majority of the students. He always articulated his view in a reasoned, civil fashion, and was very effective in getting others to consider his position seriously. I was grateful to have Mr. Lee in the class because his presence and willingness to speak provided a much richer discussion of the issues.

Mr. Lee also made a strong impression on me in torts. The class was conducted entirely through Zoom because of Covid 19 restrictions. Nonetheless, Mr. Lee stood out from the outset and throughout the semester through his consistently astute observations. Even on Zoom, his interest in law and his thoughtfulness were evident. He was the most engaged student in the group. As I expected, Mr. Lee performed very well on the torts final. My torts exams are detailed fact patterns based on real events, which students are required to analyze, raising causes of action and defenses. The exam involved an indoor gathering that resulted in an outbreak of Covid infections, illnesses, and a number of deaths. The exam was especially complex because this is a novel situation and there are solid arguments to be made on both sides. Mr. Lee's answer was outstanding. His analysis was systematic and comprehensive, earning a raw score in the top 5 percent of the class.

Overall, Mr. Lee is in the top 10% of the second year class. This is a noteworthy achievement given the high caliber of our students. Washington University School of Law is ranked 16th in the country by US News, and the median LSAT score of our recent entering classes is among the top 10 law schools in the country. Many of our students are admitted to top 10 law schools, but instead choose to matriculate at WashULaw owing to full scholarships we offer to attract the best students. I provide this information to put Mr. Lee's accomplishment in context—his ability places him among the brightest law students in the country.

Mr. Lee has had a number of quality work experiences. He worked at the Cato Institute and the Institute for Justice; and he worked for several years in the compliance office at Hogan Lovells in Louisville, rising to the position of Compliance Coordinator. Last summer, he worked as a Summer Associate at O'Melveny & Myers in Washington, D.C. His academic background (a degree in philosophy) and work experiences reveal a commitment to learning, to law, and to larger public issues. An additional benefit of his work experiences is that Mr. Lee's writing and analytical abilities are already very polished.

We have had a number of conversations outside of class. Mr. Lee is personable, bright, and affable. He is responsible, gets along with others, and performs well. I'm confident that he will be a pleasure to work with in Chambers.

Mr. Lee is seeking a judicial clerkship because he wants to develop his legal skills and work at the highest level of the profession. I have no doubt that Mr. Lee will go on to be an excellent lawyer, and will pursue a career that contributes to the profession and society. For these reasons, I urge you to provide him with the opportunity to serve as your law clerk. His research and writing will be first rate, he will be careful and strive to get things right, and the clerkship experience will significantly enhance his development as a lawyer. If you have any questions, please email me at btamanaha@wustl.edu or at my cell 718-930-2817.

Thank you for considering my recommendation.

Best,

/s/

Brian Z. Tamanaha
John S. Lehmann University Professor

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

WRITING SAMPLE

The attached writing sample is a brief submitted for Washington University's 2022 Wiley Rutledge Moot Court Competition. This brief was completed in teams of two, but I have only included portions where I was the sole author and editor. In the brief, I argue that a student has standing under the Establishment Clause when his football coach leads the team in prayer before a game.

No. 22-105

In the

Supreme Court of the United States

MAUREEN MOXON, AS NEXT FRIEND OF K.M., A MINOR CHILD,

Petitioner,

v.

WEST CANAAN UNIFIED SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to

the United States Court of Appeals

for the Twenty-First Circuit

BRIEF FOR PETITIONER

Washington University School of Law

Wiley Rutledge Moot Court Competition

Attorneys for the Petitioner

Team 15

QUESTIONS PRESENTED FOR REVIEW

1. Whether the parent of a student who refuses to participate in a prayer led by an on-duty public school employee has standing, as next friend of her child, to assert a violation of the Establishment Clause; and
2. [REDACTED]

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TABLE OF AUTHORITIES

[REDACTED]

OPINIONS BELOW

[REDACTED]

JURISDICTIONAL STATEMENT

[REDACTED]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[REDACTED]

STATEMENT OF THE CASE

A. Statement of Facts

K.M. is a 15-year-old student at West Canaan High School. R. at 1. West Canaan high school is a part of a publicly funded school district within the state of Texasota. R. at 1. K.M. lives with his mother, Maureen Moxon. R. at 1. K.M. is agnostic. R. at 1. K.M. is a member of the West Canaan freshman football team. R. at 2. Since 1992, Bud Kilmer ("Coach Kilmer") has served as the coach of the West Canaan football team. Coach Kilmer has led his students in reciting the Lord's prayer before each game since 2001. When K.M. first experienced Coach Kilmer's pregame prayers, he joined his teammates in kneeling but did not recite the prayer. R. at 2.

After the second game, K.M. expressed his discomfort in participating in the religious activity and in Coach Kilmer leading it. R. at 2. K.M. requested that Coach Kilmer refrain from leading the students in prayer. R. at 2. Stating that he had "been 'leading this team in prayer since [K.M.] was in diapers'" Coach Kilmer denied K.M.'s request. R. at 2. Coach Kilmer also explained, "he did not think it would be fair to the other players on the team who wished to join in the prayer if he were to stop reciting it." R. at 2. K.M. then requested to abstain from kneeling

during the prayer. Coach Kilmer obliged but warned, "it would be best for team unity" if K.M. joined in the prayer as he had in the past. R. at 2.

Before the third and fourth games of the season, K.M. knelt during Coach Kilmer's prayer but did not recite it. R. at 2. Starting with the fifth game of the season, K.M. did not kneel as Coach Kilmer led the team in prayer. R. at 2. After one such game, K.M. was confronted and ridiculed by teammates for not participating in the pregame prayer. R. at 2. K.M. was asked if he was a "heathen," prompting laughter from several other teammates. R. at 2.

Ms. Moxon sent a letter on October 23, 2021, to the principal of West Canaan, the superintendent, and Coach Kilmer reiterating K.M. 's request that Coach Kilmer refrained from leading the pregame prayer. R. at 2. The letter also asserted that Coach Kilmer's practice of leading the pregame prayer violated the First Amendment's Establishment Clause. R. at 2. Ms. Moxon's letter was one of many since 2002 complaining about Coach Kilmer's pregame prayers. R. at 5. West Canaan refused Ms. Moxon's request, claiming Coach Kilmer's pregame prayer did not violate the Establishment Clause. R. at 2.

B. Procedural History

On March 15, 2022, Ms. Moxon filed for an injunction under 42 U.S.C. § 1983 (1979 against West Canaan Unified School District on behalf of her son, for West Canaan's policy of permitting Coach Kilmer to lead students in prayer in violation of the Establishment Clause of the First Amendment. R. at 3. The District Court consolidated the hearing for preliminary injunction with a trial on the merits and granted the injunction, ordering West Canaan to instruct Coach Kilmer to refrain from leading his pregame prayers with students. R. at 8. The District Court found that Ms. Moxon could bring a suit for violation of her son's rights under the Establishment clause, that West Canaan's policy violated the Establishment Clause and would cause irreparable harm if

not enjoined. R. at 6–7. West Canaan appealed. R. at 9. The Court of Appeals reversed, agreeing with the District Court on the issue on standing but not the Establishment Clause issue. R. at 13. Plaintiff timely filed a petition for certiorari, which this Court granted on both issues on August 31, 2022. R. at 16.

SUMMARY OF THE ARGUMENT

[REDACTED]

ARGUMENT

I. West Canaan's Policy of Permitting Coach Kilmer to Lead Students in Prayer Causes a Legally Cognizable Injury to K.M. Sufficient to Confer Standing

K.M. suffered a legally cognizable injury which is fairly traceable to West Canaan and is certain to be redressed by a favorable ruling in the federal courts. The judicial power of the United States extends to "Cases" and "Controversies," and the doctrine of standing serves to "identify those disputes which are appropriately resolved through the judicial process." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Standing is both a Constitutional and prudential doctrine. *Lujan*, 504 U.S. at 560. The purpose of standing is "related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of resolution." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151–52 (1970). To show standing, plaintiffs must allege that they have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

This Court has interpreted the "irreducible constitutional minimum" of standing to involve three factors. *Lujan*, 504 U.S. at 560. Plaintiffs must have suffered an "injury in fact," which is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Id*. That injury must be "fairly traceable to the challenged action of the defendant" and "likely . . . [to be] redressed by a favorable decision." *Id.* at 560–61 (internal citations omitted). Determination of standing is reviewed *de novo*. *Defs. of Wildlife v. Percisepe*, 714, F.3d 1317, 1323 (D.C. Cir. 2013). Plaintiffs need not prove the factors on the merits, but only assert, by the standard of proof of the stage of litigation at issue, factors that if proven would convey standing.

See Ass'n of Data Processing, 397 U.S. at 153 (distinguishing between merit arguments and standing arguments).

It is clear that West Canaan's policy of permitting Coach Kilmer to lead students in prayer during his official duties is the cause of K.M.'s alleged injury. It is clear that issuing the requested injunction would redress K.M.'s injury. It is clear that Maureen Moxon, as the next friend of the minor child K.M. can bring his claims on his behalf. The only reason K.M. would not have standing is if his unwanted, direct, coercive exposure to religious activity by a government entity, which violates his First Amendment rights under the Establishment Clause, did not confer an "injury in fact".

K.M.'s exposure to unwanted, direct, coercive religious activity by a government entity caused him a legally cognizable injury. K.M.'s injury is concrete and particularized, not a generalized grievance. *See ACLU of Ga. v. Rabun Cnty. Chamber of Com.*, 698 F.2d 1098, 1109 (11th Cir. 1983) (stating plaintiffs demonstrated an individualized injury by alleging direct personal contact with offensive action alone). Coach Kilmer has led prayer in the locker room of a public school's football team of which K.M. is a member. R. at 1–2. K.M. has expressed his preference to not be part of these prayers, and multiple parents have expressed the inappropriate nature of a public-school coach leading prayer with students to West Canaan. R. at 2. K.M.'s injury is also both actual and imminent, as Coach Kilmer has indicated that he has been "leading this team in prayer since [K.M.] was in diapers" and is "not going to stop now." R. at 2. Therefore, the only reason K.M. would not have suffered an injury in fact is if the violation of his rights under the Establishment Clause was not a legally protected interest.

A. K.M.'s Unwanted, Direct Exposure to West Canaan's Establishment of Religious Doctrine Constitutes an Injury in Fact

K.M. suffered a legally cognizable injury when he was directly exposed to an unwanted government-sponsored display of religion. This Court's precedents set out three ways plaintiffs can show standing in Establishment Clause cases: taxpayer standing, suffering a direct harm, and being denied benefits. *Montesa v. Schwartz*, 836 F.3d 176, 194 (2d Cir. 2016) (citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129–30 (2011)). Direct exposure cases occur in two contexts, when government enacts religious laws and when citizens are exposed to religious expressions or messages sponsored or promoted by the government. *Montesa*, 836 F.3d at 196. Plaintiffs attest an injury for the purpose of standing when they are directly and immediately exposed to religious government speech, which conveys a "direct and personal stake in the controversy." *Id.* at 197.

i. Individuals have a legally cognizable interest in not being directly exposed to government-sponsored religious expression

Direct exposure to government-sponsored religious expression works a concrete injury on individuals, as has been recognized by this and inferior courts. The Establishment Clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel v. Vitale*, 370 U.S. 421, 430 (1962). The prevailing interpretation of *Engel* and other Establishment Clause cases is that standing only requires direct and unwelcome personal contact with the alleged establishment of religion. *ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 358 F.3d 1020, 1029–30 (8th Cir. 2004) (collecting cases and concurring with decisions from the Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits). By expressing that coercion is not necessary for government religious speech to cause an injury, this Court implies

that mere enactment and exposure is sufficient. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J. concurring) ("[P]roof of government coercion is not necessary to prove an establishment clause claim, [but] it is sufficient."), *Marsh v. Chambers*, 463 U.S. 783, 803 (1983) (Brennan, J. dissenting) ("The right to conscience, in the religious sphere, is not only implicated when the government engages in direct or indirect coercion.").

This does not mean that citizens can establish standing based only on an academic or ideological objection to government religious messages, but K.M. has shown far more than this. *ACLU Neb. Found.*, 358 F.3d at 1029. As required by *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), K.M. has alleged a "direct and personal subjection to a government establishment of religion." *See Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) (interpreting *Valley Forge* to classify direct contact with unwelcome religious exercise as a personal injury). As this Court has made clear, proximity to the violative message is the critical fact to establish standing under the Establishment Clause. *Suhre*, 131 F.3d at 1087 (analyzing *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963), and *Valley Forge*).

Many Establishment Clause cases alleging a direct exposure to government religious messages do not address standing, assuming direct exposure is enough and moving to the merits. This Court has done so on numerous occasions. *See, e.g.*, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct 2067, 2090 (2019); *McCreary Cnty v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). *But see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings of this sort . . . have no precedential effect."). Even when it has been addressed, this and lower courts have devoted minimal discussion to the question of standing when a direct and proximate exposure has been alleged. *See Schempp*, 374 U.S. at 224 n.

9 (relegating discussion of standing to a footnote, expressing that the interests of parents and school children directly exposed to school-sponsored bible readings "surely suffice" to convey standing), *ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484, 489–90 (6th Cir. 2004) (dedicating a short paragraph with no analysis to the question of standing). Silence on the question of standing is a determination that the plaintiff has standing since federal courts have an independent obligation to examine jurisdictional issues on appeal. *See United States v. Hays*, 515 U.S. 737, 742 (1995). By proceeding to the merits, these cases should be read as endorsing the direct exposure test—and not all rely on the *Lemon* test abandoned in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2019). *See, e.g.*, *Schempp*, 374 U.S. 203 (1963) (decided before *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

ii. Exposure to government religious speech confers an injury in fact even if that exposure is voluntary

Several courts have expressed that exposure to monuments and other displays of religious messaging causes an injury sufficient to convey standing, even though it is possible to avoid those displays. *See, e.g.*, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct 2067 (2019) (exposure to Latin Cross memorial analyzed on the merits without discussing standing); *Suhre*, 131 F.3d at 1084 (exposure to Ten Commandments on city courtroom wall conveyed standing); *Freedom from Religion Found. v. Cnty. of Lehigh*, 933 F.3d 275 (3d Cir. 2019) (exposure to Latin cross on county seal conveyed standing, even though the seal was found not to violate the Establishment Clause); *Felix v. City of Bloomfield*, 841 F.3d 848, 854 (10th Cir. 2016) (exposure to Ten Commandments on lawn of municipal building conveyed standing). *But see Am. Legion*, 139 S. Ct. at 2098 (2019) (Gorsuch, J. concurring) (arguing that "offended observer" standing is unfounded in law). K.M. did not encounter a memorial or passive form of religious government expression, but a prayer led by a government agent during their official duties. This is far more like the school graduation in

Lee v. Weisman, 505 U.S. 577 (1992), or the prayers before football games in *Santa Fe Indep. Sch Dist. v. Doe*, 530 U.S. 290 (2000). The *Santa Fe* court recognized that some students, such as football team members, are mandated to attend games, but even for those students whose attendance was not mandatory a pre-game prayer violated the Establishment Clause because it coerced "those present to participate in an act of religious worship." *Santa Fe*, 530 U.S. at 312.

Limiting Establishment Clause claims to mandatory exposure cases is an unworkable standard. Requiring nonobserving individuals to avoid religious government messages wherever possible works two additional, related harms. First, it risks making religious minorities second class citizens by depriving them of the use of government resources and facilities. *Saladin v. City of Milledgeville*, 812 F.2d 687, 692–93 (11th Cir. 1987). Requiring religious minorities to avoid government assistance and resources in order to avoid unwanted exposure to religious government speech is a "Hobson's Choice" and an unacceptable interpretation of the First Amendment. *Doe ex. Rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999), *on reh'g en banc sub nom. Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462 (5th Cir. 2001). Second, requiring nonobserving or religious minorities to change their behavior in order to gain standing—since they could then show an injury beyond exposure—would place potential plaintiffs in the position of mooting their own cases. For example, in *Bell v. Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1985), parents of public-school children who had taken steps to remove their children from a school district allegedly violating the Establishment Clause had to face arguments that their self-help had rendered their claims moot. *Id.* at 1399. Because of these related issues, the voluntariness of exposure to government religious speech cannot diminish a potential plaintiff's standing to sue.

iii. K.M. was directly exposed to West Canaan's religious message by their agent-led prayer before school football games

K.M.'s allegations carry all the indicia of direct, personal harm recognized in Establishment Clause jurisprudence. Coach Kilmer conducted a religious exercise at the beginning of football games for a public school. R. at 1. All members of the football team were in attendance. R. at 1. K.M. is a member of the football team. R. at 2. K.M. is an agnostic who does not ascribe to religious beliefs. R. at 2. K.M. was not comfortable with the display and participation therein. R. at 2. This alone caused K.M. injury sufficient to maintain standing.

Beyond mere exposure, K.M. was directly confronted with religious government speech and was instructed to participate. K.M. indicated his discomfort to Coach Kilmer. R. at 2. Coach Kilmer continued his display and indicated K.M. was expected to participate. R. at 2. K.M. was criticized and negatively affected by his lack of participation. R. at 2. West Canaan declined to address the issue even after multiple parents complained. R. at 2, 5.

Because of Coach Kilmer's actions, K.M. is denied an equal opportunity to fully participate in the football team. The football team's status as an extracurricular activity does not alleviate the injury. *See Santa Fe*, 530 U.S. at 310 (applying Establishment Clause prohibition to prayers spoken at football games). This denial works a real harm on K.M., and accompanies the spiritual, value-laden harm done any time a government institution participates in the selective establishment of religion. *Rabun Cnty.*, 698 F.2d at 1102.

B. Even if K.M.'s Direct and Unwanted Exposure Is Insufficient to Convey Standing, West Canaan's Coercion by and Through Coach Kilmer Constitutes an Injury in Fact

"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise[.]" *Weisman*, 505 U.S. at 587. Even if K.M.'s exposure to West Canann's religious messages does not constitute an

injury on its own, those messages violate this indisputable guarantee. K.M. need not establish for the purposes of standing that he was coerced by West Canaan, only that the actions of West Canaan could be seen as coercive. *See Ass'n of Data Processing*, 397 U.S. at 153 (distinguishing between merit and standing arguments). The facts here are sufficiently analogous to those in *Lee v. Weisman* and *Santa Fe Independent School District v. Doe* to show that Coach Kilmer's actions should be seen as coercive.

i. Government coercion by religious messages is sufficient to establish standing

While not necessary to proffer an Establishment Clause claim, alleging government coercion is sufficient to do so. *Weisman*, 505 U.S. at 604 (Blackmun, J. concurring). Schools are subject to "heightened concerns" of coercion. *Id.* at 591. The coercive force need not be direct—indirect social pressure is as prohibited as direct enactments of law. *Santa Fe*, 530 U.S. at 312 (citing *Weisman*, 505 U.S. at 594); *see also Engel*, 370 U.S. at 431 ("When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure . . . is plain."); *Marsh*, 463 U.S. at 803 (Brennan, J. dissenting) ("The right to conscience, in the religious sphere, is not only implicated when the government engaged in direct or indirect coercion.").

For these reasons, government sponsored prayer in public schools causes injury to every student who encounters it. *See Am. Legion*, 139 S. Ct. at 2089 (Kavanaugh, J. concurring) ("[G]overnment-sponsored prayer in public schools pose[s] a risk of coercion of students." (citing *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring))); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Bd. of Educ. of Westside Cnty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 261–62 (1990) (KENNEDY, J., concurring). This is true regardless of whether participation is mandatory or

voluntary. *Compare Schempp*, 374 U.S. at 205 (finding standing for students subjected to reading of bible verses at the start of each school day), *with Santa Fe*, 530 U.S. at 310 (finding standing for students subjected to school-sponsored prayer at a school football game).

ii. K.M. has properly alleged coercion by the government in religious messaging

K.M. was subjected to coercion beyond that experienced by students in *Santa Fe Independent School District v. Doe*. In *Santa Fe*, the court recognized that football team members have seasonal commitments that mandate their attendance at otherwise extracurricular activities. *Santa Fe*, 530 U.S. at 311. Even so, *all* students in attendance were subject to coercive pressure—not just the team members. *Id.* Here, K.M. was a member of the team: obligated to attend games and be present in the pre-game locker room prayer. R. at 1–2. Coach Kilmer's actions were even more coercive than mere recitation. Coach Kilmer indicated to K.M. that it would not be fair to the participating players for K.M. to abstain, and that team unity would suffer if he did so. R. at 2. Whereas in *Santa Fe Independent School District v. Doe* and in *Lee v. Weisman*, the concern was that a nonbeliever or dissenter would view the school's actions as enforcing religious orthodoxy, here there is a direct attempt by Coach Kilmer to enforce participation in religious exercise. The School District, even when notified of the practice, has done and will do nothing to rectify their employee's behavior. R. at 2. K.M. has experienced negative repercussions from his choice not to participate in the pre-game prayer. R. at 2. The Constitution cannot permit West Canaan and Coach Kilmer to "exact religious conformity from a student as the price" of joining the school football team. *Santa Fe*, 530 U.S. at 312.

The connection between the religious speech and government action is stronger here than in *Santa Fe Independent School District*. There, students democratically voted to have invocations

spoken at the beginning of football games by a student selected in the same manner. These "circuit breaker" mechanisms did not save the speech from its coercive force or render it Constitutional. *Id.* at 310. Coach Kilmer is not a student, and his invocation is not chosen democratically. He leads the prayer, which he chooses. R. at 1. Because he is an employee of a publicly funded school district, Coach Kilmer is an agent of the government and speaks on behalf of West Canaan to his team. R. at 1–2. The government-sponsored nature of the speech is therefore even more pronounced than in *Santa Fe*, and as alleged certainly confers an injury in fact on K.M. This coercion constitutes the forced participation that even the dissent below acknowledges conveys standing. *See* R. at 14 ("Had her son been forced to participate in Coach Kilmer's prayer . . . that might well give rise to a separate claim[.]").

C. Establishment Clause Cases Permit Standing for Non-Economic Injuries Which May Not Suffice for Standing in Other Contexts

Because standing doctrine attempts to limit federal court action to "Cases" or "Controversies," the inquiry is "tailored to reflect the kind of injuries" plaintiffs are likely to suffer. *See Suhre*, 131 F.3d at 1086 (discussing Establishment Clause standing and injuries). Unlike Tort or Contracts injuries, which are to economic or physical well-being, Establishment Clause injuries can be "particularly elusive" by their nature. *Id.* at 1085 (collecting cases). Because of this, the Religion Clauses of the constitution are an "extraordinarily sensitive" area of constitutional law and should be viewed in a different light. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Establishment Clause was intended to avoid political tyranny and subversion of civil authority and the establishment of religion is viewed more broadly than merely protecting freedom of religious expression. *McGowan v. Maryland*, 366 U.S. 420, 430 (1961) (discussing the writings of Madison). The ultimate goal of the Establishment Clause is to foster a society in which "people of all beliefs can live together harmoniously." *Am. Legion*, 139 S. Ct at 2074. When evaluating

Establishment Clause injuries, we should view as such anything that harms the ability to live harmoniously in society.

In many ways, Establishment Clause standing is viewed more leniently than in other areas of law. Establishment Clause injuries are often "to the feelings alone." *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 489 (2d Cir. 2009). Because of the lack of physical or pecuniary injuries, courts inquire as to the "spiritual, value-laden beliefs" of the plaintiffs that may be harmed. *Suhre*, 131 F.3d at 1087. While these more psychological injuries may not confer standing in other arena, this Court has recognized its importance. *See generally, Engel*, 370 U.S. at 430, *Santa Fe*, 530 U.S. 290. The Court is ever vigilant to combat the "myriad, subtle ways in which Establishment Clause values can be eroded." *Santa Fe*, 530 U.S. at 313–14. Perhaps the most obvious example of relaxed standing requirements is in *Flast v. Cohen*, 392 U.S. 83 (1968). Taxpayer standing is generally disfavored by this Court because of its connection to more generalized grievances rather than individual harms. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984). However, in *Flast* the Court recognized the purpose of the Establishment Clause was to avoid just the same generalized grievances, and so permitted the suit to continue. *Flast*, 392 U.S. at 102–05. The *Engel* Court explicitly noted that Establishment Clause claims required less than Free Exercise claims. *Engel*, 370 U.S. at 430 (noting the Free Exercise Clause requires a showing of direct governmental compulsion whereas the Establishment Clause does not).

The fact the challenged activity occurred in a school setting militates to more skepticism and more lenient standing requirements. The mandatory nature of schools lends extra force to their exercise of the authority of the State. *Weisman*, 505 U.S. at 592. Because of this force, there are "heightened concerns" with protecting "freedom of conscience" in school. *Id.* (citing *Schempp*,

374 U.S. at 307 (1963) (Goldberg, J., concurring); *see also Aguillard*, 482 U.S. at 584, *Mergens*, 496 U.S. at 261–62 (KENNEDY, J., concurring)).

The dissent below relies heavily on Justice Gorsuch's concurrence in *American Legion v. American Humanist Association* to determine that *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2019), has ended "offended observer" standing. R. at 13–14. This misreads both Gorsuch's concurrence and this Court's jurisprudence. In *American Legion*, the injury alleged was exposure to a memorial in the form of a Latin cross. *Am. Legion*, 139 S. Ct. at 2098 (Gorsuch, J. concurring). The memorial was out of the way, and the plaintiffs did not allege a direct and unwelcome exposure like K.M. *Id.* at 2079. Justice Gorsuch's concern with complaints closer to a heckler's veto than a personalized injury is not relevant here. As explained above, K.M. was directly confronted with religious government messages in a forum he was obligated to attend. R. at 1–2. The proximity to government religious expression renders K.M. more than a mere "offended observer," as even Justice Gorsuch would recognize. *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J. concurring) ("[A] public school student compelled to recite a prayer will still have standing to sue.").

Bremerton was likewise not an Establishment Clause case: Coach Kennedy's actions were vindicated under the Free Exercise Clause, and the actions were ruled to be private speech. *See Bremerton*, 142 S. Ct. at 2424. The decision cannot be read to change Establishment Clause standing requirements, and this Court should decline the invitation to do so. Even if *Bremerton* removed "offended observer" standing as the dissent below suggests, R. at 14, K.M. was still directly subjected to government speech in a manner that he could not avoid. K.M.'s position is not that of an observer, but a student coerced or compelled to recite a prayer. Given the concerns the Establishment Clause is meant to address, who else would have standing to contest West

Canaan's religious messaging? If the Establishment Clause merely prohibits actual compulsion, it protects nothing more than the Free Exercise Clause—and it has long been established that "[I]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

II. [REDACTED]

CONCLUSION

[REDACTED]

Number 29

Who's the Press Anyway? Providing a Definition of the Fourth Branch

Introduction

The Freedom of the Press has been described as the most vital constitutional protection,[1] as establishing a fourth branch of government to check the others,[2] and as effectively redundant with the Speech Clause.[3] Sadly, it is the last description that has taken hold in the Supreme Court; the Press Clause has been largely written out of the Constitution.[4] But the debate need not

[1] D. Victoria Baranetsky, *Encryption and the Press Clause*, 6 NYU J. INTELL. PROP. & ENT. L. 179, 185 (2017) (analyzing a variety of documents from the founding).

[2] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

[3] First National Bank v. Bellotti, 435 U.S. 765, 800 (1978) (Burger, C.J. concurring) ("The liberty encompassed by the Press Clause, although complimentary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints.").

[4] *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) ("[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press."); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) ("The Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech."); *see also* David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 69–70 (2006)

end there. The Supreme Court has lauded the press in a variety of cases,[5] even if its proclamations are mere dicta.[6] Appellate courts routinely read Supreme Court cases as leaving the door open to a more protective Press Clause.[7] States have enacted statutes giving preferential

(explaining that the general direction of the Court's cases is an "abandonment of the Press Clause as a specific source of constitutional authority").

[5] *See, e.g.*, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986) (leaving open the issue of whether the Press Clause rights apply to the press or non-media entities); Leathers v. Medlock, 499 U.S. 439, 447 (1991) ("the press plays a unique role as a check on government abuse."); N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (declaring the press plays an essential role in democracy); Mills v. Alabama, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press, which includes no only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs.").

[6] RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. Rev. 705, 707 (2014).

[7] For example, the plurality in *Branzburg v. Hayes*, 408 U.S. 665 (1972), held that journalists had the same protections as any other citizen under the First Amendment, but lower courts have used Justice Powell's concurrence to fashion a reporter's privilege in limited circumstances. Jonathan Peters, *Wikileaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 Fed. Comm. L.J. 667, 673 (2011) (analyzing a line of cases including *In re Madden*); *see infra* notes 32–38 and accompanying text.

treatment to the Press.[8] And some scholars call for a reinvigorated Press Clause to provide rights and protections necessary for the Press to fulfill their purpose.[9]

Along with the varied interest in the Press Clause comes a ubiquitous acknowledgment of a fundamental question—who is the Press?[10] Without some definition of the Press, any reinvigorated Press Clause rights or even statutory protections would be haphazard and unlikely to promote the important goals the Press serves. "Among advocates for an exclusive Press Clause, there is a general consensus that a functional test is the best method for determining who

[8] *See, e.g.*, 5 RCW § 5.68.010; *infra* Part III; Reporters Committee for Freedom of the Press, Reporters' Privilege Compendium, https://www.rcfp.org/reporters-privilege/ (last accessed 3/12/2022) (providing a survey of reporter shield laws).

[9] *See* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2454 (2014), STEPHEN GILLERS, JOURNALISM UNDER FIRE 65–65 (2018), Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1271 (2012).

[10] *See, e.g.*, Katherine W. Pownell, *Defamation and the Nonmedia* Speaker, 41 FED. COMM. L.J. 195, 212 (1989) (summarizing different approaches); *see also* David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. F. 331, 332 (2014) ("Another difficulty we have in identifying the press for constitutional purposes is that we started two hundred years too late. The meaning of religion for First Amendment purposes has evolved gradually, one decision at a time. The meaning of the press needs to also develop incrementally; it is unrealistic to expect its constitutional meaning to emerge full-blown.").

receive[s] Press Clause protection."[11] However, these functional tests are primarily *post-hoc* tests evaluating what an entity has done, rather than an *ex-ante* test which can guide government agencies.[12] Merely identifying the Press after Press-Activity happens is insufficient—government regulators need more guidance.

It is into this definitional quagmire this Note treads. Part I will provide an overview of the discussion surrounding the Press Clause and outline the stakes of having a definition. Part II will outline the minimum (and some aspirational) requirements of a workable definition of the Press. Part III will more closely analyze some lenses through which previous definitions of the Press have been attempted. Finally, Part IV will put forward a definition in the form of model legislation and address some potential criticisms thereof. While this Note does no more than set out the definition scholars, legislatures, and jurists could use, it should provide fertile soil in which to grow additional rights and protections of the Press.

Part I: Why Care? The Stakes Behind Defining the Press

Associate Justice Potter Stewart advocated in 1975 that the "primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."[13] This institution is elevated

[11] Tyler Valeska, *A Press Clause Right to Cover Protests*, 65 Wash. U. J.L. & Pol'y 151, 166–67 (2021).

[12] *See, e.g.*, West, *Press Exceptionalism*, *supra* note 9 (providing one such functionalist definition); *infra* notes 144–154 and accompanying text.

[13] Stewart, *supra* note 2, at 633.

by the inclusion of the Press Clause in the First Amendment.[14] The Freedom of the Press could be considered the "most powerful and dangerous constitutional privilege,"[15] and was called by the Founders the most important in the Bill of Rights.[16] But today, the Press Clause lacks any substance. The Supreme Court has generally refused to indicate that the Press Clause grants any substantive rights.[17] Nevertheless, scholars, appellate judges, and state legislatures pursue the purpose of the Press Clause in providing more robust Press rights and protections.[18] These efforts

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[14] U.S. CONST. amend. I (Reading in pertinent part "Congress shall make no law . . . abridging the freedom of speech, or of the press").

[15] Baranetsky, *supra* note 1, at 186 (citing Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 531 (1977)).

[16] JEFFREY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 69 (1988) (quoting Madison as stating that "freedom of the press and rights of conscience" are the "choicest privileges of the people.").

[17] *See* Anderson, *Freedom of the Press*, *supra* note 4, at 430 ("[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press."); Baker, *supra* note 4, at 956) ("The Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech."); *see also* Anderson, *Freedom of the Press in Wartime*, *supra* note 4, at 69–70 (explaining that the general direction of the Court's cases is an "abandonment of the Press Clause as a specific source of constitutional authority").

[18] *See infra* notes 32–38 and accompanying text.

should be supported and expanded upon. Without a robust protective framework for the Press, government actors can lie to the population with impunity, disserving the democratic process.[19]

Current Case Law

At the Supreme Court level, the Press Clause is effectively a dead letter. Scholars have shown that not only has the Court trended towards the abandonment of the Press Clause,[20] it has also progressively viewed the Press in a less favorable light.[21] Chief Justice Burger suggested in a concurrence to *First National Bank v. Bellotti*[22] that the Press Clause was effectively redundant

[19] *See generally* Helen Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. 453 (2018).

[20] Anderson, *Freedom of the Press in Wartime, supra* note 4, at 69–70 (explaining that the general direction of the Court's cases is an "abandonment of the Press Clause as a specific source of constitutional authority"); Patrick J. Charles, Kevin Francis O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press"*, 2012 UTAH L. REV. 1691, 1763 (2012).

[21] RonNell Andersen Jones, Sonja R. West, *The U. S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 393 (2022) ("The Court makes far fewer references to the press and its role in society than it did at the height of the Glory Days. When the Court does talk about the press, moreover, it does so in increasingly negative ways.").

[22] 435 U.S. 765 (1978).

to the Speech Clause, even though one of the earliest dictates of the Founding generation is that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect[.]"[23]

Wherever the Supreme Court has had the opportunity to instill the Press Clause with some meaning, it has chosen other vehicles instead. In *Pennekamp v. Florida*,[24] even while the Court affirmed the Press's ability to publish editorials lampooning the court Justice Frankfurter cautioned that "the purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it."[25] Similarly, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court held that media and nonmedia defendants receive the same First Amendment protections, effectively ignoring the potential of the Press Clause.[26] Finally, in *Richmond Newspapers, Inc. v. Virginia* and its progeny, the Court vested the public, not the press, with the right to attend criminal trials.[27]

The reluctance to imbue the Press Clause with substance may be due to the difficulty of identifying the Press.[28] The Supreme Court has engaged with the question of "who is the press"

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[23] Marbury v. Madison, 5 U.S. 137, 174 (1803); *but see* John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629 (2016) (discussing the benefits of redundancy in the law).

[24] 328 U.S. 331 (1946)

[25] *Id.*, at 364 (1946) (Frankfurter, J., concurring)

[26] 472 U.S. 749, 758–59 (1985); *see also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986) (explicitly avoiding a distinction between media and nonmedia defendants).

[27] 448 U.S. 555, 577 (1980).

[28] *See* West, *Press Exceptionalism*, *supra* note 9, at 2436.

on several occasions.[29] However, the general result of these engagements is a standard of (stealing from the oft-maligned obscenity doctrine) "we know it when we see it"[30] —which cannot suffice if additional privileges or rights are granted to the Press.[31] This is not to say that the Press have not been recognized—several cases acknowledge the Press as an institution.[32]

Taking up the challenge the Supreme Court ignores, appellate courts and state legislatures have worked to provide additional Press protections. A line of cases emerged from Justice Powell's *Branzburg v. Hayes* concurrence[33] regarding a qualified federal press reporter's privilege.[34] These cases held that individuals claiming the reporter's privilege had to meet certain criteria such as engaging in investigative reporting, gathering news, and intending to disseminate

[29] *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936) (addressing taxing press entities); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (stating the holding in press-specific terms); Miami Herald Publishing v. Tornillo, 418 U.S. 241, 244 (1974) (protecting newspaper independence)

[30] Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 449–50 (1999) (comparing the jurisprudence of journalism to the jurisprudence of obscenity).

[31] *See infra* Part III.

[32] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972) (determining whether the reporter's privilege applied in those circumstances).

[33] *Id.*, at 709–10 (Powell, J., concurring).

[34] von Bulow *ex rel.* Auersperg v. von Bulow, 811 F.2d 136 (2d Cir. 1987); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993); *In re* Madden, 151 F.3d 125 (3d Cir. 1998).

said news.[35] While this has not been taken up at the Supreme Court, it is effectively the law in the Second, Third, Fifth, and Ninth Circuits.[36] State legislatures have likewise implemented laws protecting Press rights—forty-eight currently have some shield law or recognize a source privilege.[37] Even the federal government has enacted legislation that attempted to define the press.[38]

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[35] *In re Madden*, 151 F.3d, at 131.

[36] *Supra* note 34; *In re* Grand Jury Subpoenas, No. 01-20745, n.4 (5th Cir. Aug. 17, 2001) (unpublished) https://www.cfif.org/htdocs/freedomline/current/america/appendix.pdf (noting the 5th circuit would look to the three-prong test devised by the Third Circuit).

[37] REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REPORTER'S PRIVILEGE COMPENDIUM https://www.rcfp.org/reporters-privilege/ (last accessed 3/12/2022).

[38] *See* Federal Freedom of Information Act, 5 U.S.C. § 552 (2006); 42 RCW § 42.56.030. *See also* 5 RCW § 5.68.010 (defining "news media" as: (a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution; (b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or (c) Any

Number 29

What Would a Reinvigorated Press Clause Look Like?

Without a substantive Press Clause, the Press has no more rights than other speakers. But Professor Sonja R. West of the University of Georgia has advocated, in a variety of articles, for a reinterpretation of the Press Clause as granting additional rights and privileges to the press.[39] These rights include (1) a constitutional right to access government information, meetings, and places, (2) constitutional safeguards from government subpoenas and warrants for their sources, newsrooms, and work products, and (3) absolving liability for minor torts committed while newsgathering.[40] Judges have routinely chosen not to provide such protections,[41] but a more protected press can better fulfill its fundamental goals of news-gathering, news-dissemination,

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parent, subsidiary, or affiliate of the entities listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process seeks news or information described in subsection (1) of this section.).

[39] *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (April 2011); Sonja R. West, *First Amendment Neighbors*, 66 ALA. L. REV. 357 (2014); West, *Press Exceptionalism*, *supra* note 9; Sonja R. West, *The Media Exemption Puzzle of Campaign Finance Laws*, 164 U. PA. L. REV. ONLINE 253 (2016); Sonja R. West, *The Problem with Free Press Absolutism*, 50 NEW ENG. L. REV. 191 (Winter 2016); Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91 (Feb. 2018); Sonja R. West, *The Majoritarian Press Clause*, 2020 U. CHI. LEGAL F. 311 (2020).

[40] West, *Awakening the Press Clause, supra* note 39, at 1029.

[41] West, *Free Press Absolutism*, *supra* note 39, at 199–200 (collecting cases).

and holding the government accountable.[42] Furthermore, if the Press is identified by a suitable and actionable definition, states can put in place frameworks that permit members of the Press access to otherwise off-limits areas,[43] grant Press additional rights in those areas,[44] or even expedite privileges such as FOIA requests.

Functionalist Interpretations – Why is this insufficient?

Among the scholars[45] advocating for an extended Press Clause, "there is a general consensus that a functional test is the best method for determining who receive[s] Press Clause

[42] West, *Awakening the Press Clause, supra* note 39, at 1069–70; *See Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J. dissenting) (stating there must be some right to gather news as a corollary to the right to publish); Valeska, *supra* note 11, at 159 ("The justification for affirmative Press Clause rights is rooted in the critical roles that journalists serve in our constitutional structure: gathering and disseminating news to the public and checking the government.").

[43] *E.g.*, access to the White House, *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (recognizing the right of a "bona fide Washington correspondent" to a White House Press pass); or safety to cover protests, Valeska, *supra* note 11, at 151.

[44] *E.g.*, authority to videotape executions, denied in Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994).

[45] *E.g.* West, *supra* note 39; GILLERS, *supra* note 9, at 65–65, Bezanson, *supra* note 9, at 1271.

protection."[46] West has put forward one such definition.[47] Analyzing its benefits and critiquing its shortcomings makes apparent why a definition of the Press must be applicable *ex-ante* rather than only identifiable *post-hoc*.

West's definition isn't one in the strictest sense of the word. Rather, West focuses on "finding" the Press instead of strictly defining it.[48] West takes several factors into consideration when developing her method of finding the Press. West notes that the unique functions of the Press are its fulfillment of two roles: gathering and conveying information to the public about

[46] Valeska, *supra* note 11, at 166–67.

[47] West, *Press Exceptionalism*, *supra* note 9.

[48] *Id.*, at 2443 (contesting that definition suggests some neutral arbiter creates some distinctions that did not previously exist, whereas finding or identifying suggests looking to existing distinctions for guidance). "My thesis is that there exists a naturally evolving subset of speakers who fulfill unique and constitutionally valuable press functions. Thus, whereas a 'definition' might draw static lines, a 'search' for these special speakers would logically change as their tools and methods advance." *Id.* I disagree with Professor West's characterization. From a utility standpoint, "finding" the press cannot inform institutional decision-making and therefore is less useful than a definition these institutions can use that does not necessarily "evolve." As will be discussed below, there remains room for a definition to incorporate timeless elements and technology-proof itself such that it is useful even among changing technology. *Infra* Part IV.

newsworthy matters and serving as a check on the government by that conveyance.[49] Some level of consistency is also required, or else the speaker/publisher becomes merely an "occasional public commentator."[50] Also distinguishing the Press from occasional public commentators are a knowledge (sometimes specialized) of the relevant subject matter.[51] The Press also tends to make editorial decisions that occasional speakers would not, and provide information in a timely manner.[52] Perhaps most importantly, the Press is also held accountable through either formal[53] or informal[54] means.[55] In particular, West is concerned with being too generous with her definition to avoid the redundancy that the Press Clause has currently become.[56] West's definition is less

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[49] West, *Awakening the Press Clause*, *supra* note 39, at 1069–70.

[50] West, *Press Exceptionalism*, *supra* note 9, at 2461 (defining occasional public commentators as those who "act sporadically in a press-like manner but who are not repeat players committing time and resources to press functions.").

[51] *Id.*, at 2444 (June 2014).

[52] *Id.*

[53] *E.g.* Litigation/legislation constraining speech for libel or defamation.

[54] *E.g.* audience accountability, ratings, viewership, contrary viewpoints, or reporting from other outlets on their shortcomings. *See* Society of Professional Journalists, *Professional Standards and Ethics Committee Roster*, https://www.spj.org/com-ethics.asp (last accessed 3/13/2022).

[55] West, *Press Exceptionalism*, *supra* note 9, at 2444.

[56] *Id.* (expressing concern that a broad definition of the Press would result in a hesitancy to provide any additional rights or privileges to the group as opposed to a narrower definition).

worried about members of the Press being excluded and therefore denied their rights because the Speech Clause acts as a safety net—the Press Clause only serves to provide tools beyond other first amendment protections for newsgathering and news dissemination.[57] Any entity deprived of rights under the Press Clause would not lose its opportunity to speak, so missing them in the definition has somewhat lower stakes.[58]

Professor West's process of "finding the Press" involves creating a model for identifying "a group of distinct constitutional rightsholders"[59] by analogy to the 2012 Supreme Court decision in *Hosana-Tabor Evangelical Lutheran Church and School v. EEOC*.[60] In that case, the Supreme Court confirmed that the "ministerial exception" to Title VII existed and provided an analysis of whether the defendant's situation applied.[61] The Court used a "functional inquiry" to determine if the defendant was a "minister," looking at such factors as recognition, affirmative

[57] *See generally,* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (April 2011)

[58] *See generally,* West, *Awakening the Press Clause*, *supra* note 39.

[59] *Id.*, at 2455.

[60] 565 U.S. 171 (2012).

[61] *Id.*, at 188–92. Title VII, which prohibits certain forms of employment discrimination, was therefore subject to limitations based on religious freedom. *Id.* It should be noted that the *Hosanna-Tabor* court's *holding* was only that the ministerial exception to Title VII, which had been percolating in the Circuit courts for some time, existed. The court did not actively create a test for finding ministers or any other constitutionally relevant sub-group, and the sections Professor West uses as analogy are meant to be dicta.

titles, and the function the defendant served at work.[62] Professor West aimed to follow a similar "functional inquiry" as *Hosanna-Tabor*.[63] The factors West analogizes from *Hosanna-Tabor* are: (1) recognition as the press,[64] (2) identification as the press,[65] (3) training, education, or experience, and (4) regularity of publication or established audience.[66] Professor West notes that using these factors, "virtually anyone can become a member of the press" but "not everyone with a smartphone or laptop will make the cut."[67]

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[62] *Id.*, at 192. Later court decisions significantly abrogated the relevant standards from *Hosanna-Tabor*. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (holding that the relevant question was whether the individual's role was relevant to carrying out the religious organization's mission).

[63] West, *Press Exceptionalism*, *supra* note 9, at 2455. Professor West finds the *Hosanna-Tabor* court's analysis helpful not only for what it affirmatively decided but also for what it was not concerned with. *Id.*, at 2456. In particular, "The Court further did not feel compelled to draft an all-encompassing definition that would satisfy every conceivable hypothetical situation" even though unlike with the Press Clause there is no catch-all to the Establishment or Free Exercise clauses.

[64] Hosanna-Tabor, 565 U.S. at 191 (2012) (emphasizing the importance of the church recognizing their employee as a minister in determining ministerial exception status).

[65] *Id.*, at 192 (emphasizing the importance of the employee having been identified as a minister by third parties through claiming special privileges in determining ministerial exception status).

[66] West, *Press Exceptionalism*, *supra* note 9, at 2456–60.

[67] West, *Press Exceptionalism*, *supra* note 9, at 2461.

While West's definition confers some benefits,[68] it ultimately can only be properly applied *post-hoc*. The process of "finding" the Press West promotes would occur in a courtroom, applying a set of factors to the distinct actions of an individual after Press-activity has occurred. Furthermore, West's definition includes not only functional but formalist factors.[69] Because of these shortcomings, a new definition of the Press is needed.

Part II: Requirements of a Definition

Any functional definition of the press would have several important features: the unique functions of the press, timelessness, inclusiveness of relevant entities, a search for truth, and sufficient narrowness to create a distinction between the Press and Speech Clauses. First and most importantly, the press should be the entity or entities which possess the "unique constitutional functions of the press" as identified by scholars and the Supreme Court—usually in dicta.[70] One such function is to convey information to the public about newsworthy matters.[71] Because the definition of newsworthy is outside the current scope of this paper, I will rely on the definition set forth in the Restatement (Second) of Torts: newsworthy information is that

[68] *See also infra* notes 144–154 and corresponding text.

[69] RonNell Andersen Jones, *Press Definition and the Religion Analogy*, 127 HARV. L. REV. F. 362, 362–363 (2014) (contesting the first two *Hosanna-Tabor* factors as formalist and explaining that because of the purpose for which the exception is invoked they are inappropriate in the Press context).

[70] West, *Press Exceptionalism*, *supra* note 9, at 2443; *supra* note 5; *see generally* Sonja R. West, *The Stealth Press Clause*, 48 GA L. REV. 729 (2014).

[71] West, *Press Exceptionalism*, *supra* note 9, at 2443.

information that is of legitimate public concern.[72] The other relevant function is that the press attempts to serve, at least in part, as a check on the government through conveying said newsworthy information.[73]

A definition of the press should also be timeless. Today's press looks very different from the press available during the Founding.[74] The internet has provided access to information and platforms that are not just different in scope, but different in kind that was available before.[75] Even at the Founding, a variety of different actors were considered the press—even though they used very different methods of distributing information.[76] Because of the rapid development of technology, any suitable definition would avoid overtly relying on technological benchmarks or being tied to technological developments made after the Founding. To do otherwise would create a definition destined to be "born an anachronism."[77]

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[72] Restatement (Second) of Torts § 652D (1977); *see also* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975), *cert denied*, 428 U.S. 998 (1976) (adopting the Restatement standard).

[73] West, *Press Exceptionalism*, *supra* note 9, at 2443.

[74] Baranetsky, *supra* note 1, at 185–196 (collecting sources related to the Founders' understanding of the press.)

[75] Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 68 (2018) (discussing how technological changes might undermine First Amendment protections).

[76] *See* Baranetsky, *supra* note 1, at 195.

[77] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 782 (1985).

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Any suitable definition must also include two distinct kinds of entities, the institutional press and the lonely pamphleteer.[78] The institutional press includes entities such as daily newspapers and licensed journalists.[79] However, entities that would normally be considered the institutional press have grown in scope in recent years.[80] Entities like the Cable News Network, the Microsoft/National Broadcasting Company, and FOX News have taken on not only news-gathering activities but also entertainment and editorial ones.[81] A definition of the press may need to distinguish between an institutional actor's newsworthy activities and entertainment

[78] The lonely pamphleteer has long been identified as a recipient of Press Clause protection. David L. Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 106 (1975); *see also* Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (stating that the liberty of the press is not confined to newspapers but to pamphlets and leaflets); Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (press liberty belongs to the lonely pamphleteer as much as the metropolitan publisher); First Nat'l Bank v. Belloti, 435 U.S. 765, 801 (1978) (Burger, C.J. concurring) (referencing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) regarding an entity that only occasionally published).

[79] Pownell, *supra* note 10, at 198.

[80] CABLE NEWS NETWORK, https://www.cnn.com/, (last accessed 3/12/2022) (listing topics ranging from World and United States news to Travel and Style); FOX NEWS, https://www.foxnews.com/, (last accessed 3/12/2022) (listing topics from politics and U.S. news to lifestyle and health).

[81] *See supra* note 80.

activities. On the other end of the spectrum, the "lonely pamphleteer" includes entities that operate sporadically[82] or with limited institutional support.[83] Given the ease by which individuals can access a large audience, a definition of the press may need to distinguish between bloggers who aim to entertain, or even mislead, their audience and bloggers who are engaged in legitimate news activities.[84]

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[82] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (granting press protections to an entity that only distributed nine issues).

[83] For example, today's lonely pamphleteer could be "the stereotypical 'blogger' sitting in his pajamas." *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1156 (D.C. Cir. 2006). Blogging, YouTube videos, and podcasting can all be used for non-news functions and news functions. *See, e.g.*, Green v. Pierce County, 197 Wash.2d 841, 861, 487 P.3d 499, 409 (Wash. S. Ct. 2021) (Whitener, Judge dissenting):

> Nothing *excludes* from the term 'newspaper' a single person putting together, editing, printing, and distributing a few pages of news or information—the analog equivalent of the digital task performed by Green via [his YouTube channel] Libertys Champion. So, too, with the term 'magazine'—while *The New Yorker* and *Scientific American* are separate legal entities, zines, for instance, commonly are created by one person, just like [the YouTube channel] Libertys Champion.

[84] *See, e.g.*, Green, 197 Wash.2d at 861 (the state arguing that, "Otherwise . . . every person with a social media account would be considered news media."). This distinction may need to be even more granular—what about bloggers or other individuals who both entertain and inform? What percentage of an individuals' activities need to be dedicated to newsworthy activities to qualify? Who should be empowered to determine what is information and what

The court in *Madden* also emphasized the dichotomy between entities engaged in fact and those engaged in fiction.[85] This judicial acknowledgment that journalists, and therefore the Press, deal in facts while entertainers deal in fiction should be reflected in a definition of the Press.[86] This is not to suggest that accidentally false publications should deprive an entity of Press rights or protections. Rather this is an acceptance that unlike individual speech, which relies on the marketplace of ideas to promote truthful information,[87] the Press must be engaged in the active promulgation of facts.[88]

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is entertainment? These questions are discussed in more detail below. *Infra* notes 89–93 and accompanying text.

[85] *In re* Madden, 151 F.3d 125, 130 (3d Cir. 1998).

[86] Calvert, *And You Call Yourself a Journalist?*, *supra* note 30, at 430.

[87] *See* Napoli, *supra* note 75, at 90.

[88] SPJ CODE OF ETHICS, SOC'Y OF PROF. JOURNALISTS, available at https://www.spj.org/ethicscode.asp (last accessed 3/12/2022) ("[P]ublic enlightenment is the forerunner of justice and the foundation of democracy. The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues."). Additionally, this Note makes no attempt to deal with the particular issues of "Fake News," as it is far beyond the scope herein. For one such discussion see John Roberts, *From Diet Pills to Truth Serum: How the FTC Could Be a Real Solution to Fake News*, 71 FED. COMM. L.J. 105, 106–11 (2018) (defining fake news and discussing its consequences).

Finally, a definition of the press needs to be both sufficiently inclusive and sufficiently exclusive as to create a difference between the Speech and Press Clauses.[89] This will be more difficult than it appears at first glance, especially because with the advent of the internet a large number of individuals now have the same capacity that the traditional press held at the Founding.[90] One solution may be to build in an intent requirement, meaning that to be identified as the press an entity must not only fulfill the legitimate functions listed above but must also intend to fulfill those functions.[91] The problem with an intent requirement is twofold: who decides, and how do they decide? Intent can be highly controversial as a requirement,[92] and it

[89] Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (April 2011).

[90] *See* Frederick Schauer, 89 MINN. L. R. 1256, 1262 (2005) (identifying Supreme Court cases in which the Court could not distinguish between professional journalists and bloggers).

[91] For example, New York's shield law has been interpreted to require journalists to show they are engaged in information gathering with the intent of using the information to publish a publicly circulated document. Schiller v. New York, 245 F.R.D. 112, 119 (S.D.N.Y. 2007).

[92] Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISCOURSE 230, 243 (2016) (criticizing the imposition of an intent requirement for recording police in public). Particularly here, where the rights to be conferred are to protect against government abuse and acknowledgment of the rights must come from the government, an intent requirement is inherently suspect. *Accord*, Jones, *Religion Analogy*, *supra* note 69, at 362–63 (discussing

becomes difficult for an objective evaluation to be made. However, if the Press Clause is to grant additional rights and access to information as Professor West suggests, there needs to be some way to distinguish between individuals seeking information for newsworthy purposes and those seeking information for personal gain.[93]

To recap, a definition of the press must encompass (1) the unique functions of the press (news-gathering, information dissemination, and holding government accountable); (2) both the institutional press and the "lonely pamphleteer"; (3) a focus on factual dissemination; (4) factors both sufficiently inclusive and exclusive as to distinguish the Speech and Press Clauses. A definition must not (5) rely on technology after the Founding. And finally, a *perfect* definition

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potential bias from government accountability); Valeska, *supra* note 11, at 173–75 (discussing limitations inherent in government acknowledgment of the press).

[93] Arguably this occurred in *Green v. Pierce County*, 197 Wash.2d 841, 487 P.3d 499 (Wash. S. Ct. 2021). Here, Brian Green demanded access to photographic and birthdate information on detention center personnel on two days in November 2014. *Id.*, at 846. On one of those days, Mr. Green attempted to enter the Pierce County detention center with an associate without permitting building security to search their bag. *Id.* An altercation occurred, and as a result Mr. Green was arrested. *Id.* The request for information followed. *Id.* Mr. Green insisted that the request was pursuant to a story he was writing about the Pierce County Jail. *Id.*, at 847. However, a reasonable interpretation of events is that Mr. Green was attempting to use his social media channel to obtain information about someone who he perceived had wronged him.

might (6) allow different privileges when an entity is acting in a press-like function and when an entity is acting in an entertainment-like function. The unique functions of the press and a focus on facts are the most important part of the definition, with including both the institutional and non-institutional press also being weighed heavily. Being unmoored from technology is a limiting factor to any definition. Including both the institutional press and non-institutional press is similarly a limiting factor based on Supreme Court precedent.[94] Finally, providing some distinction between the Speech and Press Clauses is also a limiting factor as it is the purpose of this exercise. While a *perfect* definition might include distinctions between entertainment and press activities, that isn't necessary to provide Professor West's reinvigorated Press Clause with a functional definition.

Part III: Past Lenses Used to Define the Press

While many proposed definitions do not fully address the unique concerns raised by Professor West's work or provide a functional definition of the press which can be used *ex-ante*,[95] several ideas can be gleaned by reviewing them. As such this section will review the definition of the press through several previously proposed lenses: (1) Press as an institution[96] (2)

[94] Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (press liberty belongs to the lonely pamphleteer as much as the metropolitan publisher).

[95] *See, e.g.*, Lange, *supra* note 78, at 106; Stewart, *supra* note 2, at 633; West, *Press Exceptionalism*, *supra* note 9, at 2443 (June 2014); *See* Federal Freedom of Information Act, 5 U.S.C. § 552 (2006); Washington State Public Records Act, RCW 42.56.030 *et seq*., 5.68.010(5).

[96] *Infra* notes 103–112 and accompanying text.

Press as a tool,[97] (3) Press as news-related activities,[98] (4) Press as circulation or regularity of publication,[99] (5) Press as a profession,[100] (6) Press as a speaker,[101] and (7) Press as a post-hoc identification.[102]

Press as an Institution

Some of the most longstanding theories of the Press Clause are viewing the Press as an "institution" and viewing the Press as a "tool."[103] The definition of the Press as an institution is meant to do just that: say the Press Clause only applies to the institutional press.[104] This specific, special protection to members of the news media respects the structural role they play in government as a watchdog.[105] States adopting this definitional theory explicitly link Press rights

[97] *Infra* notes 113–117 and accompanying text.

[98] *Infra* notes 118–121 and accompanying text.

[99] *Infra* notes 122–131 and accompanying text.

[100] *Infra* notes 132–135 and accompanying text.

[101] *Infra* notes 136-143 and accompanying text.

[102] *Infra* notes 144-154 and accompanying text.

[103] Baranetsky, *supra* note 1, at 198.

[104] *Id.*

[105] *Id.*, at 202.

to participation in specific kinds of organizations.[106] For example, Alabama provides journalist protections to newspapers and broadcasting stations—organizations which are part of the identified institutional press.[107]

The benefits of this approach come from its simplicity. A direct connection to a member of the institutional or recognized press provides a bright-line rule that legislators can use to create policy. However, this bright-line rule comes with significant drawbacks. Any list of institutional media used to create a bright-line rule would necessarily be both time-limited and incomplete.[108] Furthermore, such a list would be restricted to whatever technology is available at that time—a list made in 1920[109] would inevitably include the New York Times (as a newspaper)

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[106] *See, e.g.*, Ala. Code §12-21-142 (LexisNexis 2005) (applying the state journalist's privilege law to newspapers, radio broadcasting stations, or television stations); Ariz. Rev. Stat. Ann. §12-2237 (2003) (applying the state reporter's privilege to persons engaged in newspaper, radio, or television); Ark. Code. Ann. §16-85-510 (2005) (applying the state reporter's privilege to newspapers, periodicals, and radio stations); *See also* Colo. Rev. Stat. §13-90-119 (2009); Ga. Code Ann. §24-9-30 (2010); Md. Code Ann., Cts. & Jud. Proc. §9-112 (LexisNexis 2006); Mont. Code Ann. §26-1-902 (2009); N.Y. Jud. Law §218(2)(c) (McKinney 2005); Cal. Const. art. I, §2(b).

[107] Ala. Code §12-21-142 (LexisNexis 2005).

[108] Incompleteness would come from denying new organizations press status as well as ignoring smaller organizations.

[109] The television was first successfully demonstrated in 1927. https://stephens.hosting.nyu.edu/History%20of%20Television%20page.html.

but would not include CNN (as a television station): both of which are indisputably (at least sometimes) acting as the press. Additionally, such a list may be overinclusive. Some organizations engage in significant editorial or entertainment content alongside or instead of traditional press activities. A definition of the press based entirely on the name of the organizations you are affiliated with runs the risk of granting press privileges when the entity is engaged in non-press activities.[110] Furthermore, granting government branches which the Press is intended to check the ability to list what kinds of Press count is ripe for abuse.[111] Finally, restricting press privileges to an enumerated list of entities "reeks of government favoritism toward a privileged few"[112] and provides a direct connection between the approval of the political branches and a news agency's ability to fulfill its function. Such connection would be anathema to the renewed purpose of the Press Clause; news agencies would be unable to confidently criticize the government or even political parties for fear of losing their status.

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[110] For example, a member of the institutional press could use their credentials to access a social event with no intention of reporting on the event, whereas a non-institutional Press entity would be denied access even if they had the intent to report on the event.

[111] *See generally* John S. Clayton, *Policing the Press: Retaliatory Arrests of Newsgatherers after* Nieves v. Bartlett, 120 Colum. L. Rev. 2275 (2020) (discussing the concerns of government accountability for restricting Press access).

[112] West, *Awakening the Press Clause*, *supra* note 39, at 1029 (referencing David Lange, The Speech and Press Clauses, 23 UCLA L. Rev. 77, 102-03 (1975); Anthony Lewis, A Preferred Position for Journalism?, 7 HOFSTRA L. REV. 595, 626-27 (1979)).

Press as a Tool

The Press as a "tool" definition focuses less on *who* is saying things and more on *how* they are saying them. This definition asserts that the purpose of the Press Clause is to protect the use of technology like the printing press by individuals, rather than to protect the Press as an institution.[113] Therefore, the Press as a "tool" definition would define as the Press all individuals speaking using the various tools of the press.[114] Jurisdictions adopting this definition, such as the District of Columbia, define as the Press those who use specific media such as printed, photographic, mechanical, or electronic means.[115]

This definition is a non-starter for two related reasons. First, any published definition would be "born an anachronism" as it would be inextricably tied to the technology available at

[113] Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 466–68 (2012).

[114] *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 119 (Philadelphia, H.C. Carey & I. Lea 1825)).

[115] D.C. Code §16-4701 (LexisNexis 2001) (including within its press definition "any printed, photographic, mechanical, or electronic means of disseminating news and information to the public") The D.C. code incorporates several lenses discussed, its use here is merely to highlight one.

the time.[116] Even if the definition was fashioned in such a way that it could evolve with the times, it suffers from a second deficiency—there is no distinction between the Speech and Press Clauses under this interpretation.[117]

Press as News-related Activities

Instead of linking Press rights to particular mediums or employers, some states attach rights to the journalist's particular news-related activities.[118] For example, Ohio protects

[116] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 782 (1985). Consider the fact as well that the internet has provided a reach far exceeding anything the Founders could have conceived.

[117] *See* Baranetsky, *supra* note 1, at 206 (citing Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 466–68 (2012) (discussing several cases)).

[118] *See, e.g.*, D.C. Code §16-4701 (LexisNexis 2001) (including within its press definition "any printed, photographic, mechanical, or electronic means of disseminating news and information to the public"); Md. Code Ann., Cts. & Jud. Proc. §9-112 (LexisNexis 2006) (same); Neb. Rev. Stat. §20-146 (2007) (covering any person who is "engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public"); *see also* Ohio Rev. Code Ann. §2923.129(B)(2)(b) (West Supp. 2010); Or. Rev. Stat. §44.510 (2009); Tenn. Code Ann. §24-1-208 (2000); People v. Vasco, 31 Cal. Rptr. 3d 643, 654 (Ct. App. 2005) (interpreting California law); Federal Freedom of Information Act, 5 U.S.C. § 552 (2006).

journalists when they act "for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public."[119]

By attaching Press rights to particular activities, rather than to relationships with institutional media, an activities definition is particularly well suited to identify entities that perform the unique functions of the press. Additionally, so long as the activities are not defined with respect to technological benchmarks (e.g., sending out a newsletter via e-mail) these definitions are flexible enough to withstand changes to the Press's technology or form. Finally, it serves the necessary goal of including both the institutional press and the "lonely pamphleteer."

However, the breadth this definition results in proves fatal to its functionality. Statutes using this definition permit any individual conducting news-like activities to receive Press rights.[120] Such a broad grant risks creating the same redundancy between the Press and Speech clauses that this project seeks to avoid.[121]

Press as Circulation or Regularity of Publication

Other states focus on how regularly and to whom the Press is speaking when providing Press rights. States defining the Press this way attach Press Rights to regular publication with

[119] Ohio Rev. Code Ann. §2923.129(B)(2)(b) (West Supp. 2010).

[120] *See, e.g.*, The Freedom of Information Act, 5 U.S.C. § 522(4)(A)(ii)(II).

[121] *C.f.* West, *Awakening the Press Clause*, *supra* note 39, at 1066.

general circulation.[122] This requirement could focus on general circulation, or the size of your readership,[123] or on how regularly you publish to the public.[124]

There are several reasons to like this definition; it closely tracks the unique functions of the press (news dissemination) and is not so broad as to allow the Press Clause to be subsumed in Speech Clause protections. This definition also has ancillary benefits. Press that conducts repeat

[122] *See, e.g.*, Illinois Journalist Shield Law, 735 ILL. COMP. STAT. ANN. 5 / 8-902 (West 2003); Indiana Reporter's Privilege Statute, IND. CODE ANN. § 34-46-4-1 (LexisNexis 2008); *see also* 42 PA. CONS. STAT. ANN. §5492 (West 2000) ("No person engaged in, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation."); R.I. GEN. LAWS §9-19.1-1 (1997) (defining "newspaper" and "periodical" to mean only publications issued at regular intervals and with paid circulation and explicitly stating that the definition applies to those gathering or presenting news for any accredited newspaper); 28 C.F.R. § 540.2 (2009).

[123] Calvert, *And You Call Yourself a Journalist?*, *supra* note 30, at 448.

[124] *Id.*, at 446–47.

activities can be more effective,[125] has a better relationship of trust with the public,[126] and is less likely to be an "occasional public commentator."[127]

However, this definition can be so narrow as to exclude relevant groups. Creating a history of publication will take time, and therefore while anyone theoretically could *become* a recognized member of the Press in the eyes of the law, it will take time and effort during which they will not have the protections and rights afforded to the Press. Furthermore, defining "regular intervals" might be constitutionally infirm.[128] The "lonely pamphleteer" may not have as wide a distribution or as regular a cycle as the institutional press, but it is settled principle that they have as much right to Press privileges as the institutional press.[129] This definition also limits the Press

[125] Ronnell Andersen Jones, Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419, 467–68 (2020) (discussing the need of individuals to trust institutional actors with a reputation of truthfulness).

[126] *Id.*, at 467–68.

[127] West, *Awakening the Press Clause*, *supra* note 39, at 1066.

[128] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720 (1931) ("If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition.").

[129] Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (stating that the liberty of the press is not confined to newspapers but to pamphlets and leaflets); Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (press liberty belongs to the lonely pamphleteer as much as the metropolitan publisher); First Nat'l Bank v. Belloti, 435 U.S. 765, 801 (1978) (Burger, C.J. concurring).

in responding to minority interests for fear of reducing their reach.[130] Finally, this definition is overinclusive. Most television shows have general distribution and are regularly scheduled, but a Saturday morning cartoon cannot be the same as news. This limitation can be seen by states who use this definition also including explicit limiting principles to avoid absurdity.[131]

Press as a Profession

Yet other statutes define the Press as those who are either employed in the position of a professional journalist or who derive their principal income from Press activity.[132] While this definition would provide a bright-line rule that is easy to apply *ex-ante* and would neatly confine Press privileges to a group that is less extensive than those who receive Speech Clause privileges, it fails to address a number of concerns. Firstly, it almost entirely excludes the part-time or occasional press.[133] Any journalist that did not have institutional support would be barred

[130] *See* RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 536 (2019).

[131] *See, e.g.*, 42 PA. CONS. STAT. ANN. §5492 (West 2000) (Limiting to newspapers, magazines, and press associations with general circulation); R.I. GEN. LAWS §9-19.1-1 (1997) (defining "newspaper" and "periodical" with the explicit caveat that the definition applies to those gathering or presenting news for any accredited newspaper)

[132] Delaware Reporter Shield Law, DEL. CODE ANN. TIT. 10, § 4320 (1999); Florida Journalist Privilege Law, FLA. STAT. ANN. § 90.5015 (West 1999); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1999); 31 C.F.R. § 575.207 (2008).

[133] Which is a non-starter since it would unconstitutionally exclude the "lonely pamphleteer."

from Press privileges, and lack of those privileges would disincentivize any new journalist from attempting to obtain a sufficient following to qualify. This definition also would cause perverse incentives—if Press privileges are tied to income, the Press is incentivized to report things that are profitable rather than to fulfill their unique purpose.[134] Finally, this definition *may* be subject to the changing landscape of news activities. Even though there has almost always been an institutional press, it is not inconceivable that such institutions will disappear due to being unprofitable.[135] A right that by definition can disappear from market whims is either no right at all or is not defined adequately.

[134] Arguably this is part of the cause of the current decline in print journalism. As organizations are forced to mix the news and business sides of their publications, they lose the trust of their readership and have fewer resources available to conduct meaningful journalism. *See, e.g.*, Gregory Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 117 (2004).

[135] *See, e.g.*, Brad Agate, *Newspapers have been Struggling and Then Came the Pandemic*, FORBES (Aug. 20, 2021) (last accessed April 2, 2022) https://www.forbes.com/sites/bradadgate/2021/08/20/newspapers-have-been-struggling-and-then-came-the-pandemic/?sh=24cdb39c12e6.

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Press as a Speaker

Some scholars view the Press as a "special institutional speaker" which does more than merely provide information to the public.[136] In their view, the Press goes beyond informing listeners of facts by contextualizing, narrating, and educating the public on newsworthy matters.[137] This definition has some traction within the appellate courts.[138] An example of this principle in action would be the denial of journalist privileges to Wikileaks, should they request to keep their sources confidential.[139] Wikileaks produces minimal narrative or context to its document dumps, instead choosing to "enable readers to analyse (sic) the story in the context of the original source material themselves."[140] Because Wikileaks "has passed on to the mainstream

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[136] Jones, *Press Speakers*, *supra* note 130, at 520.

[137] Jones, *Press Speakers*, *supra* note 130, at 523–27.

[138] *See In re* Madden 151 F.3d 125, 130 (3d Cir. 1998) (suggesting that to be engaged in investigative reporting one needs to do more than be a passive receptacle of information and needs to seek out sources beyond in-house sources). Investigative reporting is not all there is to the Press, though it most closely aligns with the government accountability purpose of the Press.

[139] *See* Peters, *supra* note 7; Douglas Lee, *Trying to Exclude WikiLeaks from Shield Law Stinks*, FIRST AMENDMENT CENTER (Aug. 25, 2010), http://www.firstamendmentcenter.org/commentary.aspx?id=23303.

[140] Peters, *supra* note 7, at 677 (citing ABOUT, WIKILEAKS, http://wikileaks.ch/about.html (last accessed Apr. 14, 2011)).

media the burden of investigative reporting—of adding value to the leaked documents by examining them and explaining their meaning and significance"—they cannot be considered the Press.[141]

This definition is promising in some respects. It separates the Press from their sources and requires a certain kind of investment that separates journalists from occasional public commenters—they need to know enough to provide the context. However, requiring the Press to provide not only factual information but context and narrative might undermine what the Press is intended to do: provide information to the public.[142] Furthermore, it is unclear whether this additional value would fall under the Press Clause or is better situated under the Speech

[141] *Id.*, at 683. Peters does require more than *some* addition of value, since Wikileaks does nominally add some perspective. *See Iraq War Crimes Surface; Probably Greatest War-Leak in Military History*, ECONOMICSJUNKIE (Oct. 22, 2010), http://www.economicsjunkie.com/iraq-war-crimes-surface-on-wikileaks-probably-greatest-leak-in-military-history/ (the original story is no longer available on Wikileaks, but was reposted here). Thus, it would be more charitable to say Peters requires *sufficient* value-add to be journalism, rather than *any* value-add. Peters does go on to say that Wikileaks would not be considered the Press because they do not take steps to minimize harm unlike others in the mainstream Press. Peters, *supra* note 7, at 683–87.

[142] *Supra* notes 70–73 and accompanying text.

Clause—protecting the affirmative speech of the Press as an entity rather than as the fourth institution of government.[143]

Press as post-hoc identification rather than an ex-ante definition.

Professor West's suggestion is to define the press not by what they intend to do or who they are, but rather by what they have already done.[144] Rather than drawing "static lines" demarcating who the press is, instead Professor West would "train our courts to recognize [the press] in action."[145] Drawing on analogies to dicta in the Supreme Court case *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*,[146] Professor West abandons any formal legal definition and instead suggests courts adopt a case-by-case approach using factors like if third parties recognize the entity as the press and if the entity/individual has special training or education.[147]

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[143] *See generally* Jones, *Press Speakers*, *supra* note 130 (discussing the Press models of "mere conduit" and "symbiotic" and the role of the Press as an institutional speaker).

[144] West, *Press Exceptionalism*, *supra* note 9, at 2443 (June 2014)

[145] *Id.*

[146] 565 U.S. 171, 191 (2012).

[147] West, *Press Exceptionalism*, *supra* note 9, at 2456–62 (the full factors are (1) recognition as the press, (2) identification as the press, (3) training, education, or experience, and (4) regularity of publication or established audience).

This "definition" provides immense flexibility and would result in anyone being able to become a member of the press.[148] The process of identifying the press is also timeless since courts can use new factors and ideas of who the press are based on developing circumstances.[149] It also can be inclusive because individual factors need not be dispositive—an individual doesn't need specialized training or education if they regularly post to an established audience, identifies themself as the press, and is generally recognized as such.[150] This *ex-post* process will also be the most accurate accounting of who the press is since it relies entirely on hindsight and by evaluating actions already completed. However, even if this process is the most accurate in identifying who the press *was*, it provides no guidance to either the Press or legislatures seeking to grant Press rights in accordance with a reinvigorated Press Clause. Even if courts accept that an individual should not be held liable for minor torts committed in the process of newsgathering, that individual cannot rely on a court's later determination when making decisions.[151]

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[148] *Id.*, at 2462.

[149] *Id.*, at 2448–50.

[150] *Id.*, at 2462.

[151] It could be argued that this process would develop, over time, the same robust understanding of the Press Clause as we have for the Establishment Clause. *See supra* note 10. However, until that process has occurred legislators and others will need an actionable, *ex-ante* definition. This process is better suited to refining such a definition than establishing it.

Perhaps the best example is a follow-up case to *Hosanna-Tabor*: *Our Lady of Guadalupe School v. Morrissey-Berru*.[152] In his majority opinion Justice Alito explicitly ignored the factors the Court set out only eight years prior in favor of a more over-arching factor. The individuals in this case could not have predicted whether they met the Court's prior enumerated factors, and they certainly could not have predicted that the Court would upend a recently enacted doctrine.[153] Without this reliance, individuals who would be a part of the Press and would fulfill the unique functions of the Press might choose not to.[154] Legislatures would also be hesitant to provide additional rights and privileges to members of the Press if Courts had unilateral control over who the Press would eventually be. Without the certainty conveyed by an *ex-ante* definition, a revitalized Press Clause would be stillborn.

Part IV: A Model Definition of the Press

Each of the definitions discussed above is deficient in some way. Either it is too inclusive, relies too much on the status quo, insufficiently incentivizes proper Press activity, or ignores the need for an *ex-ante* definition. The fact that so many definitions have been tried suggests that in general, legislatures and the public *know* who the Press is, even if an effective definition remains elusive. To overcome these deficiencies, the definition below should be used.

[152] 140 S. Ct. 2049 (2020).

[153] At least, they did not advocate for that result in the submitted briefs.

[154] Calvert, *And You Call Yourself a Journalist?*, *supra* note 30, at 438 ("Vague laws raise special First Amendment concerns because of the chilling effect they may have on speech.").

Number 29

Model Legislation

§ 1: Definitions

(a) Press – The Press is any entity actively gathering or disseminating newsworthy information for the purpose of publication. This publication must be made both representing that its contents are true and with subjective affirmation (by editorial vetting or affirmation of truthfulness) of that truth.
(b) Journalist – any individual who is an employee or agent of an entity defined in paragraph (a) who participates in newsgathering activities of the institution OR any individual with significant expertise, experience, or education in newsgathering and news dissemination who is actively involved in those activities.
(c) Newsworthy information—Information that is of legitimate public concern.

This definition accomplishes a few key goals. First, it focuses on the primary purpose of the Press–gathering and disseminating news. However, it avoids the shortcomings of other definitions by acknowledging that some entities will specialize in acquiring newsworthy information and others will specialize in disseminating that information. Furthermore, by focusing on the functions of the Press rather than the form it takes or the technology it uses, this definition is not bound to any current form of the Press.[155]

The definition also lacks any significant publication or circulation requirements beyond the obligation to publish the information. Other circulation and publication requirements can result in minority issues being ignored and preference established media over newcomers—an issue that is explicitly against the "lonely pamphleteer" concept of the Press. It does provide

[155] *Id.*, at 425 (1999) ("[I]t would be unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate but not as the author of a book about the same topic.") (citations omitted).

some experience and education qualifications for the Press to permit easier identification of the institutional Press, but this is intended as a gloss rather than a requirement.

Finally, the requirement that the publication is both subjectively believed to be true and externally held out as true separates the Press from entertainers and "Fake News" agents whose goals are not to provide government accountability or disseminate newsworthy information. This is not to say that the information needs to be *true*. Mistakes are still permitted and nothing in this definition should be read to upset the actual malice standard set forth in *New York Times Co. v. Sullivan*.[156] The definition merely requires that the Press believe what they are publishing is true information, and they tell their readers they believe it to actually be true to the best of their knowledge.[157] Between the requirements of newsworthiness and truth, there is sufficient

[156] 376 U.S. 254 (1964).

[157] As an example, outlets such as the National Enquirer should not be considered members of the Press because they do not believe their own statements to be that of fact. *See* Jeffrey Toobin, *The Complicated Truth about the National Enquirer*, CNN (Sun. May 17, 2020 6:03 AM) ("[T]he magazine is written so that it will not be successfully sued for libel – not written to tell the actual truth."). Likewise, outlets like the Onion should not be considered members of the Press because they do not tell their readers that their statements are true. *About The Onion*, THE ONION https://www.theonion.com/the-onion-is-the-world-s-leading-news-publication-offe-1819653457 (Last accessed April 2, 2022) ("*The Onion* uses invented names in all of its stories, except in cases where public figures are being satirized.").

distinction between the Press and Speech Clauses to avoid the surplusage West is concerned about.

Potential Concerns

Unlike with religion, which has had two hundred years of judicial scrutiny, the Press Clause has not had the opportunity to come to a definition incrementally and organically.[158] As such, any proposed definition is likely to be deficient in some way. Given the goals set out above, the model legislation proposed could be challenged in at least three ways. First, the definition relies on some vague concepts such as "newsworthy" and "significant." Second, merely requiring subjective affirmations of truth may not be sufficient to weed out bad actors. And third, this definition may be *too* inclusive, since anyone representing that they want access to information for a single publication may qualify.

As to vague concepts, unfortunately the jurisprudence surrounding the Press is rife with half-baked and ill-defined terms.[159] While the definition of the Press advocated would be better if these terms were defined at the outset, the scope of this Note precludes further discussion. Thus, reliance on previously proposed definitions will have to suffice until judicial scrutiny is brought

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[158] Anderson, *The Press and Democratic Dialogue*, *supra* note 10, at 334.

[159] Calvert, *And You Call Yourself a Journalist?*, *supra* note 30, at 437 (1999); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 700 (1996). Courts "are reluctant to restrict or define newsworthiness, deferring instead to the press." *Id.* "Essentially, if an item has been printed it is deemed newsworthy by the courts." *Id.*

to bear. The over-inclusiveness of the definition was a policy choice, and the words of Chief Justice Hughes put it best in the opinion of *Near v. Minnesota*:[160]

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.[161]

Given the importance of the Press Clause to the Founders and the extensiveness they argued for, a definition should start broad and be narrowed with experience rather than the other way around. Even if some bad actors may find their way around the requirements of the definition, the proper remedy should be *their* exclusion, not exclusion of wider groups of individuals or entities.

Conclusion

"Congress shall make no law . . . abridging the Freedom of the Press."[162] The Founders did not imagine that the judiciary, not the legislature, would be the biggest hurdle to a robust Press Clause. Scholars, legislatures, and appellate jurists have taken up the challenge that the Supreme Court has ignored, and in doing so have created a patchwork of rights and protections that rely on a variety of sources for justification. A Press identified by a unified definition, protected by a bevy of sources, and acknowledged across society could do much more to facilitate the particular functions

[160] 283 U.S. 697 (1931).

[161] *Id.*, at 718.

[162] U.S. CONST. amend. I.

envisioned of it by the Founders. With this definition, the Press can act with confidence knowing their legal standing, legislatures can provide privileges and avenues to information to the Press more directly, and the judiciary can be informed that these individuals are serving a vital role in democracy and should be protected. But identifying a definition of the Press is merely the first step. From here, these institutions should seek to reinvigorate the Press Clause and buttress our democracy through an independent, empowered Press.

Applicant Details

First Name	**Shelby**
Last Name	**Struble**
Citizenship Status	**U. S. Citizen**
Email Address	**strublso@udmercy.edu**
Address	**Address** **Street** **32850 Saratoga Ave** **City** **Warren** **State/Territory** **Michigan** **Zip** **48093** **Country** **United States**
Contact Phone Number	**586-744-9049**

Applicant Education

BA/BS From	**Oakland University**
Date of BA/BS	**December 2017**
JD/LLB From	**University of Detroit Mercy School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=32301&yr=2011**
Date of JD/LLB	**May 10, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**University of Detroit Mercy Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Richards, Michelle
streicmi@udmercy.edu
313-596-0228
Golden, Dierdre
goldende@udmercy.edu
Broughton, J. Richard
broughjr@udmercy.edu
3135969845

References

(1) Nick Bondar-586.713.4177- Nick.Bondar.12@gmail.com
(2) Doris Haworth- 248.408.4256- haworthd@flagstar.com
(3) Laura Secchi- 586.615.4208- laura.secchi@flagstar.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Shelby Struble
32850 Saratoga Ave., Warren, MI 48093|Strublso@udmercy.edu |586.744.9049

June 24, 2023

The Honorable Stephanie Dawkins Davis
Federal Building and U.S Courthouse
600 Church Street, Room 125
Flint, MI 48502

Dear Judge Davis,

I am writing to apply for a 2024-2025 clerkship with your chambers. I am a rising third-year student at the University of Detroit Mercy School of Law. Born and raised in metro Detroit, I have a strong commitment to practice in Michigan after clerking. I would welcome the opportunity to learn from your experience as a judge, a career I plan to pursue. Judge White introduced us briefly last year and I was glad to see a position available in your chambers.

Why should you choose me over other candidates? The answer is simple: resilience. A decade ago, I lived in my car, working and studying full-time during my undergraduate years. I was determined to support myself. At twenty-three, I bought my own home, finally finding a place to call my own. During my undergraduate studies, I initially pursued a major I had no interest in, but after facing failure, I changed my major to psychology, where I excelled academically and received honors consistently. Six years ago, I took on a job as a bank teller, but my dedication and work ethic led to a surprising offer from the company to become a corporate accountant. Despite not having a background in math, I taught myself complex accounting and earned two promotions within three years. After six years in a professional setting, I saved enough money to fully commit to law school, where I currently rank third in my class. I have achieved three book awards, five 4.0 GPAs, and had the incredible opportunity to extern for the Honorable Helene N. White of the Sixth Circuit Court of Appeals. Notably, Judge White utilized my legal research in her authored opinion, highlighting the value of my work. Additionally, I chose to work as a part-time law clerk during my studies to enhance my professional writing skills. I believe that my experiences demonstrate how I can positively contribute to your chambers, and I am confident in my ability to thrive in this clerkship position.

Enclosed please find my resume, law school transcript, and writing samples. The writing samples are: (1) my Law Review Note examining the viability of proposed federal legislation, and (2) a motion for summary judgment seeking denial of a defendant's discharge in a Chapter 7 bankruptcy case. Also enclosed are letters of recommendation from Professors J. Richard Broughton (313.596.9845), Deirdre Golden (313.585.6765), and Michelle Richards (248.767.2860).

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Shelby O. Struble

Shelby Struble
32850 Saratoga Ave., Warren, MI 48093|Strublso@udmercy.edu |586.744.9049

Education

University of Detroit Mercy School of Law, Detroit, MI
Juris Doctor Candidate, May 2024
GPA: 3.69|Rank: 3/117

- Book Awards: Criminal Law, Property, and Public Health Law
- Dean's List: Fall 2021, Winter 2022, Fall 2022, Winter 2023
- University of Detroit Mercy Law Review Leadership: Symposium Director
- Recipient of the Legacy of Excellence Scholarship, the Hon. Lawrence Paul Zatkoff Memorial Scholarship, and the Macomb County Bar Foundation Trustee Scholarship

Oakland University, Rochester Hills, MI
Bachelor of Arts in Psychology, December 2017
GPA: 3.51

- Dean's List: Winter 2016, Fall 2016, Winter 2017, Fall 2017

Experience

Secrest Wardle, Troy, MI
Law Clerk, January 2023-current

- Draft complaints, motions and briefs in support, and portions of an application for leave to appeal
- Conduct legal research and analysis, review and summarize records, and observe depositions

United States Court of Appeals for the Sixth Circuit, Detroit, MI
Extern for The Honorable Helene White, Summer 2022

- Wrote memoranda on Second, Eighth, and Fourteenth Amendment standards
- Observed sentencing hearings, a criminal trial, and motions in limine
- Attended en banc hearings in Cincinnati, Ohio

Flagstar Bank, Troy, MI
Corporate Accountant, Investment Securities, March 2020-July 2021

- Managed the entire asset-backed security portfolio, including overseeing sales and purchases of investment securities and reconciling the coinciding forty-two general ledger accounts
- Participated in filing the 10-K (unaudited financial statements) and 10-Q (audited financial statements)
- Analyzed financial statements to aid in decision-making regarding the sale and purchase of securities

Corporate Associate Accountant, Deposit Accounting, November 2017-March 2020

- Advocated for deposit customers and developed corporate training manuals for associate accountants
- Developed bank fraud prevention process which identified and combated mobile check deposit scams

Bank Teller, May 2015-November 2017

- Recognized as Banker of the Month, June 2016

Community Service

Oakland Family Services, Pontiac, MI (2018-2020)

- Collected, organized, and distributed Christmas gifts for low-income families

Activities

- Wedding officiant, painter, History Channel enthusiast

6/15/23, 5:27 PM Student Grades

(/StudentSelfService/)

Shelby Struble

View Grades

Student Grades - Shelby Struble (T02060603)

All Terms **Professional**

GPA Summary View Details

-	3.69	-	3.69
All Terms	Institutional	Transfer	Overall

Course Work

Search by Course Title or Subject Code (ALT+Y)

Subject	Course Title	Campus	Midterm Grade	Final Grade	Attempted Hours	Earned Hours	GPA Hours	Quality Points	CRN	Term	Action
LAW 5160, 01	Externship	OL		P	3.000	3.000	0.000	0.00	30528	Summer 2022	
LAW 4045, 01	Law Review Note or Comment	L		P	2.000	2.000	0.000	0.00	23816	Winter 2023	
LAW 4040, 01	Law Review	L		P	1.000	1.000	0.000	0.00	12650	Fall 2022	
LAW 1152, 01	Civil Procedure	L		4.0	4.000	4.000	4.000	16.00	17349	Fall 2021	
LAW 2251, 01	Public Health Law	L		4.0	3.000	3.000	3.000	12.00	27179	Winter 2023	
LAW 1130, OL	Torts	OL		4.0	4.000	4.000	4.000	16.00	27277	Winter 2022	
LAW 1120, 02	Property I	L		4.0	3.000	3.000	3.000	12.00	12553	Fall 2021	
LAW 1140, 02	Criminal Law	L		4.0	3.000	3.000	3.000	12.00	17344	Fall 2021	
LAW 2060, 01	US Constitutional Law	L		3.9	4.000	4.000	4.000	15.60	12567	Fall 2022	
LAW 1082, 03	App Legal Theory & Analysis I	L		3.8	3.000	3.000	3.000	11.40	17580	Fall 2021	
LAW 2220, 01	Evidence	L		3.8	4.000	4.000	4.000	15.20	12574	Fall 2022	

6/15/23, 5:27 PM Student Grades

Subject	Course Title	Campus	Midterm Grade	Final Grade	Attempted Hours	Earned Hours	GPA Hours	Quality Points	CRN	Term	Action
LAW 1083, 03	App Legal Theory & Analysis II	L		3.7	4.000	4.000	4.000	14.80	27164	Winter 2022	
LAW 7050, 01	Health Law LFP	OL		3.7	3.000	3.000	3.000	11.10	21380	Winter 2023	
LAW 2250, 01	Health Law	OL		3.7	3.000	3.000	3.000	11.10	12580	Fall 2022	
LAW 6220, 01	Federal Criminal Law	L		3.6	3.000	3.000	3.000	10.80	22723	Winter 2023	
LAW 1121, 02	Property II	OL		3.5	3.000	3.000	3.000	10.50	26179	Winter 2022	
LAW 3520, 01	International Trade and NAFTA	OL		3.4	3.000	3.000	3.000	10.20	16443	Fall 2022	
LAW 1110, 01	Contracts I	L		3.2	3.000	3.000	3.000	9.60	12548	Fall 2021	
LAW 2470, 02	Professional Responsibility	L		3.2	3.000	3.000	3.000	9.60	27430	Winter 2023	
LAW 1111, 01	Contracts II	L		3.0	3.000	3.000	3.000	9.00	26181	Winter 2022	

DETROIT MERCY LAW

EDUCATING THE COMPLETE LAWYER

June 26, 2023

Re: Shelby Struble – Letter of Recommendation
Judicial Law Clerk

I am writing in strong recommendation of Shelby Struble for a judicial clerkship in your court. Ms. Struble has been a student of mine at Detroit Mercy School of Law in Civil Procedure as a 1L and recently in Public Health Law as a 2L. Simply put, she has been an outstanding student in each of these courses. In fact, she earned a 4.0 in Civil Procedure, a course that most 1L students find to be the most difficult. Also, even though Public Health Law is traditionally meant for 3L students as a capstone because the material demands a strong constitutional law foundation, Ms. Struble earned a 4.0 and will receive the Book Award in this course because of her strong academic performance overall. From the beginning of my experience with Ms. Struble, I have been so impressed with her maturity, work ethic, and enthusiasm for everything about the law. Also, Ms. Struble is a naturally gifted writer and is among the most intelligent and committed students with whom I have had the good fortune of working in 20 years at the law school and it comes as no surprise that she is ranked 3rd in her class. Because of this, I happily agreed to serve as her Law Review Note Advisor this past year. Though the note-writing process is typically a challenge for most students, Ms. Struble was an absolute delight to work with, submitting her organized and well-written drafts well ahead of schedule and being open to critique and suggestions as her Note developed. I have even encouraged her to submit her Note outside of the Detroit Mercy environment as I believe her topic is timely and will be a wonderful contribution to the public health law dialogue.

After spending considerable time with Ms. Struble, I believe she is an excellent candidate for a judicial clerkship. She is a skilled writer, an outstanding researcher, and a strong analytical thinker. She also can think creatively about legal problems effectively and thoughtfully, a skill that will serve her well in her legal career. Further, she collaborates well with her classmates on class assignments and group projects, demonstrating that she is as comfortable working with a group as she is working independently.

In short, Ms. Struble is an insightful, kind, intelligent, and conscientious individual who would make an outstanding judicial law clerk. Please feel free to contact me with any questions via email at streicmi@udmercy.edu or by phone at 248-767-2860.

Sincerely,

Michelle L. Richards
Associate Professor of Law
Detroit Mercy School of Law

DETROIT MERCY LAW

EDUCATING THE COMPLETE LAWYER

Deirdre Golden, MD, MS, JD, LLM
Grosse Pointe Farms,
Michigan 48236
goldende@udmercy.edu
313 585 6765

June 5, 2023

Dear Judge,

,

Shelby Struble, one of my students at the University of Detroit Mercy Law School, has asked me to write to you recommending her for a judicial clerkship in your chambers. I am delighted to be able to do so for many reasons, not the least of which is my personal contact with Shelby during some of the most rigorous courses at the law school.

Mrs. Struble's credentials, academically, socially, and professionally, speak for themselves. She is already, a very valuable member, not only of the Detroit Mercy Law Community, but also, the Greater Detroit Community, and the Greater Michigan Community, having worked in the area of banking and the law.

Mrs. Struble is a dedicated student, always exercising good judgment and assuming responsibility for her decisions. She is a self-motivated individual with proven leadership and analytical skills; the ability to adapt to any work environment and effectively communicate and relate to colleagues and clients.

Adhering to a rigorous schedule of academic and practical legal training that she set herself, including officiating in three wedding ceremonies, Mrs. Struble strongly believes that she possesses the capabilities to become an excellent lawyer. Mrs. Struble is committed to the qualities essential to the practice of law in a variety of areas, while continuing to develop specialized analytical skills.

While enrolled in our JD program, Ms. Struble participated in law school organizations and is a member of the Law Review's Leadership Team. In each course, Mrs. Struble undertakes, she strives for excellence, applying significant research capabilities. Her analytical, and extraordinarily mature writing skills are applied to each assignment, participating enthusiastically in class discussion and presentations, and developing collegial relationships with faculty and staff.

In my experience, Mrs. Struble is an exceptionally smart, hardworking, conscientious person with a real desire to use her knowledge for the benefit of others. She is also one of indefatigable and positive students I know. I believe the wonderful combination of traits that she possesses – her experience across multiple professional disciplines, a love of learning, dedication to helping others and a strong sense of ethics – suits her most uniquely for any position in the law and to receive this position in your chambers.

Please feel free to contact me at the number or e-mail address appearing at the top of this letter, or on my cell phone (313-585-6765), if you would like to speak further about Mrs. Shelby Struble.

Yours Sincerely,

Deirdre Golden, MD, MS, JD, LLM

Deirdre Golden, MD, MS, JD, LLM

University of Detroit Mercy
School of Law
law.udmercy.edu

651 East Jefferson Avenue
Detroit, Michigan 48226-4386
313-596-0200

DETROIT MERCY LAW

EDUCATING THE COMPLETE LAWYER

June 30, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals
Potter Stewart United States Courthouse
Cincinnati, Ohio 45202

Dear Judge Davis,

Shelby Struble, a rising third-year student at the University of Detroit Mercy School of Law, is seeking a clerkship in your chambers. She has asked me to write a letter of recommendation on her behalf. I highly and enthusiastically recommend Shelby for a clerkship. She is smart and talented – one of our very best students – and has a bright future in the profession. Indeed, I cannot overstate how strongly I support her application or how strong a candidate that she is.

Shelby was a student in my courses on Constitutional Law (Fall 2022) and Federal Criminal Law (Winter 2023). In Constitutional Law, Shelby received the second-highest grade in the course and wrote an excellent set of exams. She also received a very strong grade in Federal Criminal Law (one of the highest), and had the highest grade in two of her first-year courses, another significant accomplishment. In class, she asks thoughtful questions and regularly offers insightful commentary on complex issues of law. Shelby serves, too, as a member of the *University of Detroit Mercy Law Review*, and will direct the *Law Review's* symposium activities in the coming year. This past year, she came to me for assistance with her student *Law Review* note, on which she did impressive work.

In addition to her excellent academic record (she is also the recipient of three notable scholarships), she has already had valuable work experience in the legal profession. Last summer, she held a prestigious judicial externship, working in the chambers of Judge Helene White on the United States Court of Appeals for the Sixth Circuit. That is a rare opportunity for a law student after her first year, and it is a testament to the potential that others in the profession see in Shelby. She now serves as a law clerk at Secrest Wardle, experience that will also be valuable to her ahead of a judicial clerkship.

I have enjoyed working with Shelby. She is highly intelligent, a serious student, and always professional and friendly. As a former judicial law clerk, I am confident that she will serve you well, and that she possesses the knowledge, skills, and character to achieve great success in the legal profession. She deserves the most serious consideration for this clerkship opportunity.

Please let me know if I can provide any additional assistance.

Sincerely,

J. Richard Broughton
Associate Dean for Faculty Research & Development
Professor of Law
broughjr@udmercy.edu
313.596.9845

University of Detroit Mercy School of Law
law.udmercy.edu

651 East Jefferson Ave.
Detroit, Michigan 48226-4386
313-596-0200

Shelby Struble
32850 Saratoga Ave., Warren, MI 48093|Strublso@udmercy.edu |586.744.9049

Writing Sample

The following is an extract from my Note prepared during the Law Review Seminar that took place in the fall of 2022 and winter of 2023. The Note assesses the feasibility of federal legislation that aims to authorize individuals with terminal illnesses to obtain experimental treatments, specifically Schedule I drugs. The selected excerpt focuses on the background and evaluation of the proposed Right to Try Clarification Act.

Psychedelic-Assisted Therapy for Terminally Ill Patients: Evaluating the Viability of Proposed Federal Legislation

Shelby Struble

A. The Trickett Wendler, Frank Mongiello, Jordan McLinn, and Matthew Bellina Right to Try Act May Allow Terminally Ill People Access to Psychedelics.

In 2018, the Trickett Wendler, Frank Mongiello, Jordan McLinn, and Matthew Bellina Right to Try Act was signed into federal law and gave hope to terminally ill patients seeking access to investigational treatments.[1] The approval process for investigational drugs, biological products, and devices in the United States often takes many years,[2] and a terminally ill patient does not have the luxury of waiting for an investigational drug, product, or device to receive final approval from the U.S. Food and Drug Administration (FDA).[3] This legislation effectively functions to "bar the federal government from prohibiting or restricting the production, manufacture, distribution, prescribing, or dispensing of an experimental drug, biological product, or device that is intended to treat a terminally ill patient and is authorized by and in accordance with state law."[4] Researchers are the Goldwater Institute describe the purpose of the Right to Try Act was stated as:

> [A] new pathway to terminally ill patients who have exhausted their government-approved options and can't get into a clinical trial to access treatments. Although 41 states have passed Right to Try laws, the signing of S.204 makes Right to Try the law of the land, creating a uniform system for terminal patients seeking access to investigational treatments.[5]

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[1] The Trickett Wendler, Frank Mongiello, Jordan McLinn, and Matthew Bellina Right to Try Act of 2017, 21 U.S.C. § 360bbb-0a.
[2] 163 CONG. REC. S4111, S4112 (2017).
[3] *Id.* at S4113.
[4] *Id.*
[5] Right To Try, *What Is Right To Try?*, GOLDWATER INSTITUTE, https://righttotry.org/about-right-to-try/#:~:text=Although%2041%20states%20have%20passed,seeking%20access%20to%20investigational%20treatments (last visited Feb. 17, 2023).

Patients suffering from incurable diseases like ALS and muscular dystrophy originally advocated for right-to-try bills in hopes of trying experimental drugs that had been proven safe by the FDA.[6] The Right to Try Act's primary function is to relieve qualifying individuals from regulatory requirements that would otherwise be imposed on eligible investigational drugs under the FCPA.[7] The Act states that a sponsor, manufacturer, prescriber, dispenser, or other individual entity, will not incur liability for an act or omission concerning an eligible investigational drug provided to an eligible patient.[8] Under the Right to Try Act, an eligible patient has: "been diagnosed with a life-threatening disease or condition"[9] and "exhausted approved treatment options and is unable to participate in a clinical trial involving the eligible investigational drug, as certified by a physician."[10] Furthermore, an eligible investigational drug is one for which:

> (1) an FDA-approved Phase 1 clinical trial has been completed;
> (2) that hasn't been approved or licensed for any use;
> (3) for which an application has been filed with the FDA or is subject to an active investigation in a clinical trial that is intended to form a primary basis of approval; and
> (4) is in active and ongoing development or production and has not been discontinued by the manufacturer or placed on a clinical hold.[11]

While there is no liability provision regarding the treatment for a manufacturer, distributor, prescriber, dispenser, possessor, or user of such a treatment,[12] there are exceptions for "reckless or willful misconduct, gross negligence, or an intentional tort."[13] Section (c) of the Right to Try Act states that the clinical outcomes may not be used by a federal agency to adversely impact

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[6] 163 CONG. REC. S4788 (2017) (statement of Sen. Ron Johnson).
[7] Advanced Integrative Med. Sci. Inst., PLLC v. Garland, 24 F.4th 1249, 1252–53 (9th Cir. 2022).
[8] 21 U.S.C. § 360bbb-0a.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] AGATA BODIE, CONGR. RSCH. SERV., R45414, EXPANDED ACCESS AND RIGHT TO TRY: ACCESS TO INVESTIGATIONAL DRUGS 2 (Mar. 16, 2021).

review or approval of the treatment—unless the government deems the use of the outcome to be critical in determining the drug's safety or at the sponsor's request.[14] Lastly, the manufacturer or sponsor of an eligible investigational drug is required to submit an annual summary to the FDA.[15]

The number of patients that received investigational drugs under the Right to Try Act is few-and-far-between. A study led by University of California Principal Counsel Hillary Noll Kalay reports that, "As of December 2019, fewer than ten patients have received access to an investigational product via the federal Right to Try Law."[16] This lack of use might be attributed to factors like (1) cost and insurance coverage, (2) lack of definitions on key terms in the statute,[17] (3) patients finding a doctor that facilitate access to unapproved drugs outside the clinical setting, (4) manufactures unwillingness to make the investigational drugs available, and (5) pressure on institutions "to answer fundamental questions about how they view the role of government in regulating health care versus the importance of patient and physician autonomy in clinical decision-making."[18]

Recent litigation is calling on the federal government to clarify what the scope of the Right to Try Act is—specifically whether it applies to Schedule I substances. Psychedelics that undergo an FDA-approved Phase 1 clinical trial may qualify as eligible investigational drugs under the Act. Researchers recently completed a Phase-3 MDMA study and a Phase-2 psilocybin trial. At the end of 2022, Multidisciplinary Association for Psychedelic Studies (MAPS)

[14] 21 U.S.C. § 360bbb-0a(c).
[15] 21 C.F.R. § 300.200 (2023); *see also* 21 U.S.C. § 360bbb-0a.
[16] Hillary Noll Kalay et. al., *Navigating Right to Try Requests: Institutional Considerations and Approaches*, 13 J. HEALTH & LIFE SCI. L. 12, 23 (2020).
[17] *Id.* at 34.
[18] *Id.* at 30.

completed its second Phase-3 MDMA study[19] and COMPASS Pathways published its Phase-2 psilocybin trial.[20] The Usona Institute announced plans in 2022 to "mov[e] confidently toward a Phase 3 study with psilocybin."[21]

If Schedule I substances are found to be eligible investigational drugs under the Right to Try Act, this means the law would permit terminally-ill people access to investigational drugs not only to treat their terminal disease, but also for *therapeutic* mental-health treatment. The decisions to come could make the Right to Try Act one perceived as a "well-intentioned but misguided law,"[22] to one that facilitates opportunities to decrease the mental suffering of vulnerable Americans.

B. The Advanced Integrative Medical Service Institute Challenges the DEA on Whether the Right to Try Act Accommodates Schedule I Drugs.

The DEA is denying terminally ill patients psilocybin therapy under the Right to Try Act and patient advocates are calling on the DEA for accommodations. Dr. Sunil Aggarwal, the founder of the Advanced Integrative Medical Science Institute (hereinafter AIMS) in Seattle, Washington, petitioned the DEA for guidance on how to obtain the Right to Try access to psilocybin for his patients with terminal cancer. His letter stated that he "was registered by the DEA to prescribe controlled substances [on Schedules II-IV], and sought 'additional registration' under the Act 'to obtain psilocybin, a Schedule I drug, for therapeutic use with terminally ill

[19] *Second MAPS-Sponsored Phase 3 Trial of MDMA-Assisted Therapy for PTSD Completed*, MAPS (Nov. 17, 2022), https://maps.org/2022/11/17/mapp2-second-maps-sponsored-phase-3-trial-of-mdma-assisted-therapy-for-ptsd-completed/.
[20] *COMPASS Pathways announces publication of phase 2b study of COMP360 psilocybin therapy for treatment-resistant depression in The New England Journal of Medicine*, COMPASS PATHWAYS (Nov. 3, 2022), https://compasspathways.com/compass-pathways-announces-publication-of-phase-2b-study-of-comp360-psilocybin-therapy-for-treatment-resistant-depression-in-the-new-england-journal-of-medicine/.
[21] *Annual Impact Report 2022*, USONA INSTITUTE, https://www.impact.usonainstitute.org/ (last visited Feb. 17, 2022).
[22] Jennifer Byrne, *Right to Try: A 'well-intentioned' but 'misguided' law*, HEALIO (Mar. 10, 2020), https://www.healio.com/news/hematology-oncology/20200303/right-to-try-a-wellintentioned-but-misguided-law.

cancer patients suffering anxiety and/or depression.'"[23] The claim followed with the assertion "that psilocybin qualified as an eligible investigational drug under the RTT Act . . . and was the subject of an active IND application obtained by a company called Organix."[24] The DEA stated that the doctor should apply for a Schedule I researcher registration with DEA to conduct research with mushrooms because researchers are exempt from criminal liability under the CSA. The DEA told Dr. Aggarwal that it "'has no authority to waive any of the CSA's requirements pursuant to the RTT.'"[25] Dr. Aggarwal and his patients filed suit in federal court in 2022.

The Ninth Circuit dismissed the case for lack of jurisdiction when it concluded the DEA'S letter did not constitute a final decision, therefore preventing the district court from addressing the merits of the claim. The question presented and left unanswered was if patients with advanced illnesses have the Right to Try psilocybin under state and federal law.[26] Following dismissal on February 2nd, 2022, AIMS and Dr. Aggarwal filed a Petition to Reschedule psilocybin from Schedule I to Schedule II.[27] Additionally, they petitioned the DEA for a waiver or exemption of the CSA's registration requirements.[28] On September 23, 2022, the DEA responded to Dr. Aggarwal's reclassification request saying "the CSA requires that psilocybin remain in Schedule I."[29] After years of sparring, the DEA finally gave Dr. Aggarwal a final decision that would allow the courts to address the merits of his claim.[30] This resulted in Aggarwal filing a petition with the Ninth Circuit Court of Appeals asking the court to review the

[23] Advanced Integrative Med. Sci. Inst., 24 F.4th at 1254.
[24] *Id.*
[25] *Id.* at 1255.
[26] *Id.* at 1261.
[27] Advanced Integrative Med. Sci. Inst., PLLC v. Garland, No. 4:22-cv-02396 (¶ 25) (S.D. Tex. Jul. 19, 2022), https://s3.documentcloud.org/documents/22090035/aims-v-garland-foia-complaint-pdf-1.pdf.
[28] *Id.* at ¶ 26.
[29] Letter from Kristi O'Malley, Assistant Adm'r, Diversion Control Div., to Dr. Sunil Aggarwal, Advanced Med. Sci. Inst. (Sept. 23, 2022), www.law360.com/articles/1541981/attachments/0.
[30] *Id.*

DEA's decision to refuse to grant a waiver or exemption of the CSA to terminally ill patients looking to use psilocybin under the federal Right to Try Act.[31]

Additionally, Senator Cory Booker (D-NJ), Senator Rand Paul (R-KY), Representative Earl Blumenauer (D-OR), and Representative Nancy Mace (R-S.C.) joined forces to introduce bipartisan and bicameral legislation named the Federal Right to Try Clarification Act on July 20, 2022.[32] The legislation seeks to amend the Right to Try Act by inserting an exemption to the Controlled Substances Act in order to clarify that patients with life-threatening conditions are permitted access to Schedule I drugs that have completed a Phase 1 clinical trial.[33] Congress's efforts to expand investigational access runs in unison with—and partly because of—the *AIMS* litigation.

Congressional findings include the FDA's designation of multiple Schedule I drugs to be breakthrough therapies and seemingly references *AIMS v. Garland* by including that "eligible patients have not been permitted access to these drugs pursuant to the Federal Right to Try law."[34] The forty-one states that currently have Right to Try laws will have lawful access to eligible Schedule I drugs if the Clarification Act passes, however, "states remain free to permit or prohibit Right to Try use under their own laws."[35]

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[31] Kyle Jaeger, *Advocates And Experts Join Fight Against DEA In Federal Psilocybin Rescheduling Case*, MARIJUANA MOMENT (Feb. 20, 2023), https://www.marijuanamoment.net/advocates-and-experts-join-fight-against-dea-in-federal-psilocybin-rescheduling-case/.
[32] Kyle Jaeger, *Cory Booker And Rand Paul Bill Would Force DEA To Let Patients Use Psychedelics And Marijuana*, MARIJUANA MOMENT (July 20, 2022), https://www.marijuanamoment.net/cory-booker-and-rand-paul-bill-would-force-dea-to-let-patients-use-psychedelics-and-marijuana/.
[33] Right to Try Clarification Act, H.R. 8440, 117th Cong. (2022) (As previously stated, examples of psychedelic manufacturers that meet the Phase-1 testing requirement are MAPS, COMPASS Pathways, and Usona Institute.).
[34] *Id.*
[35] Press Release, Sen. Cory Booker, Booker, Paul Introduce Bipartisan Legislation to Amend the Right to Try Act to Assist Terminally Ill Patients (July 26, 2022), https://www.booker.senate.gov/news/press/booker-paul-introduce-bipartisan-legislation-to-amend-the-right-to-try-act-to-assist-terminally-ill-patients.

C. The Benefits of the Right to Try Clarification Act and How It Would Provide Terminally Ill Patients Access to Psychedelics.

If enacted,[36] the Right to Try Clarification Act could operate like this:

> Once an eligible patient or their legal representative provides the treating physician written informed consent, the physician and patient must contact a manufacturer of the desired substance. To acquire a psilocybin product in the United States, an eligible patient must look towards the companies currently undergoing clinical trials of psilocybin products. Therefore, an eligible patient and their treating physician would be allowed to contact Usona or Compass Pathways to acquire psilocybin products under Right to Try. If a psilocybin manufacturer agrees to provide the eligible patient psilocybin products, there are no further requirements. In other words, neither the eligible patient nor the treating physician are required to contact the FDA or any other federal agency about the eligible patient's use of the psilocybin product.[37]

According to the DEA's Response Brief in *Advanced Integrative Med. Sci. Inst., PLLC, v. Garland*, Dr. Aggarwal was unable to obtain psilocybin from the Usona Institute, one of the companies undergoing a Phase 2 clinical trial at the time.[38] However, the Petitioners advised the DEA "that a DEA-registered manufacturer and distributor of psilocybin [Organix Inc.] had agreed to provide the investigational drug on receipt of evidence of DEA's approval."[39]

An important determination to be made would be whether the law requires the companies providing the psilocybin to be a *company* that's currently undergoing clinical trials[40] or if only the *substance* is in ongoing research. For example, although *AIMS* stated that Organix held an active Investigation Drug Researcher Application (IDR) for psilocybin with the FDA,[41] the

[36] The largest and most obvious hurdle to this legislation passing is the recent change in political landscape in Congress. Since the Right to Try Clarification Act and the Breakthrough Therapies Act did not pass in the 117th Congress. As such, the bills will have to be reintroduced in the 118th Congress.
[37] Dustin Robinson & Steven Avalon, *Right to Try in Regard to Psilocybin*, MR. PSYCHEDELIC LAW, https://mrpsychedeliclaw.com/blog/right-to-try-in-regard-to-psilocybin/ (last visited Feb. 16, 2023).
[38] Advanced Integrative Med. Sci. Inst., PLLC, v. Garland, 2021 WL 2673037, at *13–14 (9th Cir. 2022).
[39] Advanced Integrative Med. Sci. Inst., PLLC, v. Garland, 2021 WL 2073572, at *36 (9th Cir. 2022).
[40] Robinson & Avalon, *supra* note 37.
[41] Advanced Integrative Med. Sci. Inst., PLLC, v. Garland, 2021 WL 2673037, at *14 (9th Cir. 2022).

company is not currently undergoing clinical trials with the drug.[42] If the former is true, the options for physicians and patients under the Clarification Act would be severely limited to requesting distribution of psilocybin from companies like Usona Institute and Compass Pathways that are investigating the drug. However, the Right to Try Act did not create a positive entitlement and therefore, does not require manufacturers to provide the drug.[43] Companies will have to determine if "'allowing patients access to these drugs outside of a trial is not going to derail the clinical development of the product . . . [and] [i]f it's going to take too much of a company's resources or if it's going to mean that they can't enroll their clinical trials.'"[44] Nonetheless, keeping the government out of an individual's private decision regarding their palliative care treatment plan is what ultimately makes the Right to Try Clarification Act an attractive option. The decision to utilize psychedelic treatment would be left to the patient, their doctor, and the drug manufacturer. Removing the government from this conversation removes one hurdle from an already time-sensitive situation.

Another benefit of the Right to Try Clarification Act is permitting terminally-ill patients access to psychedelics to treat psychological conditions that run comorbid with the terminal illness. One consideration in assessing the likely success of the Right to Try Clarification Act is whether psychological disorders (such as treatment-resistant depression, anxiety, and PTSD) must be considered life-threatening diseases or conditions to fall within the scope of the Act. The Justice Department has already called this into question in its response brief, stating that: "petitioners do not seek psilocybin to treat the life-threatening disease that triggers 'eligible

[42] Michael Haichin, *Psychedelics Drug Development Tracker*, PSYCHEDELIC ALPHA, https://psychedelicalpha.com/data/psychedelic-drug-development-tracker (last visited Feb. 18, 2022).
[43] The Trickett Wendler, Frank Mongiello, Jordan McLinn, and Matthew Bellina Right to Try Act of 2017 ("Right to Try Act," P.L. 115-176).
[44] Byrne, *supra* note 22.

patient' status under the Right to Try Act. Rather, they seek to treat depression and anxiety . . . common conditions among the general populace and almost certainly more common among those with life-threatening conditions."[45] Supporting the Assistant Attorney General's contention is the fact that Right to Try bills were originally advocated for by patients suffering from incurable physical diseases like ALS and muscular dystrophy.[46] However, the purpose of the Right to Try Act was to broaden patients' rights in choosing their palliative care treatment plan; "to give brave patients across this country some choice over their own destinies[.]"[47]

Nothing in the Right to Try Act forecloses the possibility that it be used to treat comorbid psychological disorders. First, nothing in the federal Act states that a patient diagnosed with a terminal illness can only be considered an eligible patient if the patient only intends to use an eligible investigational drug to treat the terminal illness.[48] Senator Booker stated that the reason for the Clarification Act is because Schedule I drugs "have shown exceptional promise in treating a variety of mental health conditions, including suicidal depression, anxiety, and PTSD . . . and to be safe and effective."[49] Moreover, mental health treatment is an essential part of a palliative care treatment plan.

Additionally, the preamble to the Right to Try Act states that it "authorize[s] the use of unapproved medical products by patients diagnosed with a terminal illness in accordance with State law[.]"[50] If Congress intended the Act to be used only for unapproved medical products *meant to treat the terminal illness*, it could have included this provision. That being said, the fact

[45] Advanced Integrative Med. Sci. Inst., PLLC, v. Garland, 2021 WL 2673037, at *28 (9th Cir. 2022).
[46] 163 CONG. REC. S4788 (2017) (statement of Sen. Ron Johnson).
[47] 163 CONG. REC. H8381 (2017) (statement of Rep. Andy Biggs).
[48] However, Michigan's Right to Try Act states that: "An attestation that the patient concurs with his or her physician in believing that all currently approved and conventionally recognized treatments are unlikely to prolong the patient's life." MICH. COMP. LAWS § 333.26451(2)(d)(ii) (2022).
[49] Press Release, Sen. Cory Booker, *supra* note 35.
[50] P.L. 115-176.

that the Act only applies to patients diagnosed with a terminal illness makes it unlikely that the Clarification Act will undermine the goal of the CSA—contrary to the DEA's belief that, "Application of the CSA to restrict the use of psilocybin by patients with life-threatening conditions thus furthers the CSA's main objectives 'to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.'"[51] According to the DEA, drug abuse is "When controlled substances are used in a manner or amount inconsistent with the legitimate medical use, it is called drug abuse. The non-sanctioned use of substances controlled in Schedules I through V of the CSA is considered drug abuse."[52]

The requirements of the Right to Try Clarification Act make it unlikely to become a psychedelic "free-for-all" for terminally-ill patients experiencing depression and anxiety. The requirements address abuse concerns by reinforcing the importance that the substances are used in a manner consistent with legitimate medical use. For example, there's a need to be terminally ill, exhaust approved treatment options (standard-of-care treatment like anti-depressants, anti-anxiety medications, psychotherapy, etc.), the oversight of a treating physician, and inability to participate in clinical trials.[53] The Clarification Act would permit the use of these controlled substances in a narrowly-tailored manner and is far from broad, generalized use. As unfortunate as the circumstances are for these patients, their use of these drugs is not considered a risk for abuse because it would not be persistent and recreational.

[51] Advanced Integrative Med. Sci. Inst., PLLC, v. Garland, 2021 WL 2673037, at *29 (9th Cir. 2022) (citing Gonzales v. Raich, 545 U.S. 1, 12 (2005).
[52] U.S. DRUG ENF'T ADMIN., DEP'T OF JUST., DRUGS OF ABUSE: A DEA RESOURCE GUIDE 47–48 (2022), https://www.dea.gov/sites/default/files/2022-12/2022_DOA_eBook_File_Final.pdf.
[53] Byrne, *supra* note 22.

Shelby Struble
32850 Saratoga Ave., Warren, MI 48093|Strublso@udmercy.edu |586.744.9049

Writing Sample

The following is an excerpt of my argument section of the brief in support of a motion for summary judgment for the class Applied Legal Theory and Analysis in the winter 2022 semester. On behalf of Duder Mifflin, I argue that the debtor, Dwight Schrute, should be denied discharge under 11 U.S.C. § 727(a)(2)(A) because the debtor made a fraudulent prepetition transfer of property.

V. ARGUMENT

Embattled with creditors on all sides, Dwight Schrute decided to sell his house to a family member for $1.00 eleven months before his bankruptcy filing. Mr. Schrute directly admitted that he transferred Schrute Farms to avoid creditor claims (Stipulation, ¶13(a)). Moreover, the record indicates multiple instances of conduct that demonstrate a strong inference of his fraudulent intent. The extent that the record shows Mr. Schrute's actual and inferred intent to defraud creditors is sufficient to meet the Fed. R. Civ. P. 56(a) standard. Nothing more needs to be proven for the Court to deny Mr. Schrute's discharge under 11 U.S.C. § 727(a)(2)(A).

Count I of Dunder Mifflin's Complaint seeks denial of Mr. Schrute's discharge under Section 727(a)(2)(A) of the Bankruptcy Code. The statute states:

> The Court shall grant the Debtor a discharge unless - - the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed - -
> (A)property of the debtor, within one year before the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A). "Exceptions to discharge are narrowly construed in furtherance of the Bankruptcy Code's fresh start policy." *In re Wise*, 590 B.R. 401, 429 (Bankr. E.D. Mich. 2018) (internal citation and quotation omitted). Thus, the statutory exceptions to discharge are generally to be "strictly construed in favor of the debtor." *United States v. Storey*, 640 F.3d 739, 743 (6th Cir. 2011). "The dual goals of the Bankruptcy Code [are] -- providing the honest, but unfortunate debtor with a fresh start but also "mak[ing] certain that those who seek the shelter of the [B]ankruptcy [C]ode do not play fast and loose with their assets or with the reality of their affairs." *In re Wise,* 590 B.R. at 434.

The Sixth Circuit previously stated that "[Section 727(a)(2)(A)] encompasses two elements: 1) a disposition of property, such as concealment, and 2) 'a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act disposing of the property.'" *Keeney v. Smith* (*In re Keeney*), 227 F.3d 679 (6th Cir. 2000) (quoting *Hughes v. Lawson* (*In re Lawson*), 122 F.3d 1237, 1240 (9th Cir. 1997)). That statute specifies that the act of concealment and requisite intent must occur within a year before the bankruptcy petition is filed. *In re Keeney*, 227 F.3d at 684. "A debtor's intent may be inferred from the circumstances surrounding his objectionable conduct." *Id.* (internal citation and quotation omitted).

Dunder Mifflin does not dispute the one-year statute of limitations and the disposition of property requirements. It is clear that a transfer of property eleven months prepetition falls within this timeframe. This motion focuses on Mr. Schrute's subjective intent to defraud creditors by transferring Schrute Farms to his cousin. Dunder Mifflin contends that no genuine dispute of material fact exists with this element. When viewing the case under the totality of the circumstances, as *Keeney* requires this Court to consider, summary judgment is therefore proper.

A. The Transfer of Schrute Farms Meets the Timing Requirement and the Definition of a Transfer Under Section 727(a)(2)(A).

As stated above, the transfer and timing requirements of Section 727(a)(2)(A) are beyond serious dispute. Courts routinely find granting one's title to property to another sufficient to be considered a transfer. Under 11 U.S.C. § 101(54), the term transfer means:

> (A) the creation of a lien;
> (B) the retention of title as a security interest;
> (C) the foreclosure of a debtor's equity of redemption; or
> (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with--
> (i) property; or
> (ii) an interest in property.

11 U.S.C. § 101(54). "Under the Bankruptcy Code's broad definition of transfer, even a Chapter 7 debtor's disposition of possession, custody, or control of property could qualify as a 'transfer,' for discharge-denial purposes." *In re Wise*, 590 B.R. at 430 (quoting *Carter-Jones Lumber Co. v. Beatty (In re Beatty)*, 583 B.R. 128, 136 (Bankr. N.D. Ohio 2018)). In *Wise*, the defendant moving $250,000 from her bank account to her law firm's IOLTA account was considered a transfer of property under Section 727(a)(2)(A) because the Revised Fee Agreement with the firm limited the debtor's legal title, possession, and control of the proceeds. *Id*. at 439. This Court found defendant's conveyance of his 98% interest in an LLC to a business acquaintance was considered a transfer in *Schwartz v. Schwartz (In re Schwartz)*, 527 B.R. 266 (Bankr. E.D. Mich. 2015). The Sixth Circuit found two real estate conveyances granting title from a son to his parents a transfer within the meaning of Section 727(a)(2). *See In re Keeney*, 227 F.3d 679.

Here, Mr. Schrute admitted that he had been the owner of real property located at 1234 Schrute Farms Drive, Schrute Farms, Michigan 48000, and that he transferred this property to his cousin, Mose Schrute. (Stipulation, ¶ 13). Similarly to the real estate conveyances in *Keeney*, Mr. Schrute voluntarily conveyed his home to a family member. The title transfer of Schrute farms means Mr. Schrute no longer has the sole legal title, possession, or control over the property—much akin to the disposition of money this Court found to be a transfer in *In re Wise*, 590 B.R. 401. Therefore, granting legal title of one's property over to a third party is sufficient to be considered a transfer under the Bankruptcy Code's broad definition of transfer.

Lastly, the timing of the transfer occurred within one year before Mr. Schrute filed his bankruptcy petition. Section 727(a)(2)(A)'s timing requirement states the Court shall deny a discharge if the disposition of property occurs within one year before filing the petition. In *Wise*,

the defendant's transfer of money from her personal bank account to her law firm's IOLTA account occurred seven months prior to filing and met the timing requirements of the statute. *In re Wise*, 590 B.R. 401. A transfer of an interest in an LLC approximately six months before filing a bankruptcy petition occurred one year before filing the petition. *In re Schwartz,* 527 B.R. 266. Here, the timing requirement of Section 727(a)(2)(A) is satisfied because the transfer occurred approximately 11 months before filing his bankruptcy petition, thus falling within the one-year statute of limitations. Therefore, both elements one and two are met.

B. Mr. Schrute Transferred Schrute Farms Intending to Defraud his Creditors.

The final element for denial of Mr. Schrute's discharge under 727(a)(2)(A)—and the only element upon which there can be any conceivable dispute—is his fraudulent intent. The circumstances surrounding the transfer of Schrute Farms and Mr. Schrute's admission that he intended to defraud his creditors with this transfer permits the Court to draw an inference of fraudulent intent against him.

In order for a debtor's discharge to be denied, section 727(a)(2)(A) requires the debtor to have the subjective intent to hinder, delay, or defraud a creditor when disposing of their property. "Fraudulent intent requires actual—not constructive—fraud." *In re Koch*, 564 B.R. 553, 567 (Bankr. E.D. Mich. 2017). "However, because debtors rarely admit fraudulent intent, it may be inferred from the circumstantial evidence." *Id.* (internal citation omitted). "[C]ourts . . . deduce fraudulent intent from all the facts and circumstances of a case." *Keeney*, 227 F.3d at 686. "[A] finding of fraudulent intent is a question of fact that is highly dependent on the bankruptcy court's assessment of the debtor's credibility*." In re Koch*, 564 B.R. 553, 567 (Bankr. E.D. Mich. 2017) (internal quotations and citation omitted).

i. Mr. Schrute's Admission that he Intended to Defraud his Creditors Demonstrates his Fraudulent Intent.

Mr. Schrute presents one of the few instances where a debtor directly admits their fraudulent intent. As this Court noted in *Koch*, "debtors rarely admit their fraudulent intent[.]" *Cutler,* 564 B.R. at 567. However, when such admissions do occur, this Court has found such sufficient to warrant a denial of discharge.

The defendant in *Schwartz* transferred his largest asset and put the sale proceeds into the bank account of a "dormant entity that he had just recently transferred to a third party for no consideration." *In re Schwartz*, 527 B.R. at 276. Schwartz freely admitted that his "express purpose was to hide money from his largest creditor[.]" *Id*. This Court found that the defendant's free admission satisfied § 727(a)(2)(A)'s subjective intent element, stating that the "Debtor had a subjective intent to hinder and delay BBB. That was the Debtor's expressly stated purpose. That is all that § 727(a)(2)(A) requires." *Id.* at 275. In *Wise*, the defendant's testimony that the amount of money transferred was the amount of money her creditor sought and "felt given the eviction that that money should **be secured** . . . ." served as evidence of her intent to defraud. *In re Wise*, 590 B.R. at 442. The court stated that "by 'secured,' here, Olivia clearly meant secure from the possible reach of her father." *Id*.

The present case is one of the few when a defendant admits to their fraudulent intent. Mr. Schrute admitted that he intentionally transferred his house to avoid to creditor claims at the § 341 Meeting of Creditors. (Stipulation, ¶ 13(a)). This "free admission" has been found by this Court to be a sufficient showing of fraudulent intent. *See In re Schwartz*, 527 B.R. 266, at 276. It can be inferred that "avoiding" creditor claims meant that Mr. Schrute intended to keep his property out

of reach of his creditors, as this admission mirrors that of the Defendant in *Wise*, who "secured" her property from creditors by transferring proceeds to her law firm. *In re Wise*, 590 B.R. at 442.

It follows that when a defendant testifies that their expressly stated purpose of transferring property was to keep it away from creditors, this Court finds the intent element of Section 727(a)(2)(A) satisfied. Further, there is no conceivable evidence Mr. Schrute could offer to dissuade the Court from the only possible conclusion: that his transfer was committed with fraudulent intent. Therefore, Mr. Schrute's free admission that he transferred his home to Mose Schrute to defraud his creditors satisfies this element. If the Court does not find that the summary judgment standards for actual intent are met by Mr. Shrute's admission, Dunder Mifflin asks it to find the inferred intent element met in the alternative.

ii. Mr. Schrute's Fraudulent Intent is Strongly Inferred by the Circumstances Surrounding the Transfer of Schrute Farms.

Mr. Schrute not only admitted he intended to defraud his creditors, but his conduct surrounding the transfer also leads to an inference of fraudulent intent. Even in instances where intent to defraud is not admitted, courts have found circumstantial evidence sufficient to meet the intent requirement. "However, since defendants will rarely admit their fraudulent intent, actual intent may be inferred from circumstantial evidence." *In re Wise*, 590 B.R. at 443 (internal citations omitted). "[A] debtor's intent may be inferred from the circumstances surrounding his objectionable conduct." *In re Keeney*, 227 F.3d at 683. *In Cutler*, this Court laid out certain badges of fraud that can be used to infer fraudulent intent:

> 1. The lack or inadequacy of consideration;
> 2. A family, friendship, or other close associate relationship between the parties;
> 3. The retention of possession, benefit, or use of the property in question;

> 4. The financial condition of the party sought to be charged both before and after the transaction in question;
> 5. The existence or cumulative effect of a pattern or series of transactions or course of conduct after incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; and
> 6. The general chronology of events and transaction.

In re Cutler, 291 B.R. 718, 723 (Bankr. E.D. Mich. 2003) (internal citations omitted). "Moreover, just one wrongful act may be sufficient to show actual intent . . . [although] a continuing pattern of wrongful behavior is a stronger indication [thereof]." *In re Wise*, 590 B.R. at 435 (internal citations omitted). All of the badges of fraud referenced in *Cutler* are found in the present case.

1. Mr. Schrute's Transfer of Schrute Farms to a Family Member for Inadequate Consideration Supports an Inference of his Fraudulent Intent.

Selling a house with a market value of $120,000.00 for $1.00 to a family member is a strong indication of Mr. Schrute's actual intent to defraud his creditors by keeping the property out of their reach. *See* Stipulation, ¶¶ 13; 13(b). This Court has previously found inadequacy of consideration sufficient to infer the debtor's fraudulent intent. A debtor's transfer of his 98% interest in an LLC for $1.00 was "improper" and served as evidence that the debtor's express purpose for transferring his interest in the LLC was to hide proceeds from a sale of his property from his creditor. *In re Schwartz*, 527 B.R. 266, 277 (Bankr. E.D. Mich. 2015). In addition to the lack of money exchanged, the defendant receiving no benefit in exchange for the transfer has been taken into account when determining fraudulent intent as shown by *In re Cutler*, 291 B.R. at 723. In that case, the defendant transferred proceeds from refinancing his home to two companies which he did not have any contractual liability. The court found, "[B]oth transfers were gratuitous. Cutler admitted that he had no obligation to [the companies he transferred property to]. Moreover, he received no benefit from the transfers." *Id.*

Here, Mr. Schrute transferred his house for $1.00 when its market value is $120,000.00. (Stipulation, ¶¶ 13; 13(b)). Had Schrute Farms sold for its fair market value, Mr. Schrute could have satisfied his debt of $50,000.00 to Dunder Mifflin and retained the remaining proceeds. The $1.00 received in exchange for selling his home is analogous to the $1.00 this Court found to be "improper" inadequate consideration in *Schwartz. In re Schwartz*, 527 B.R. at 277. Additionally, the transfer of Schrute Farms bears striking similarities to *Cutler*, as Mr. Schrute received no benefit from the transfer because the result was foregoing his legal rights and equity in the property. The only benefit conferred for the transfer was keeping his property out of reach of creditors. Additionally, the record shows that Mr. Schrute owed no obligation to Mose Schrute.

Furthermore, Mr. Schrute transferred Schrute farms to his cousin, Mose Schrute, for $1.00. (Stipulation, ¶ 13). Fraudulent intent is usually met in circumstances in which a transfer is between family members because they are likely to help each other when faced with financial difficulties. In *Keeney*, the Sixth Circuit Court found two real estate conveyances placing title to the property in the names of the debtor's parents sufficient evidence to support the inference of fraudulent intent. *See In re Keeney*, 227 F.3d at 683.

Applicant Details

First Name	**Aleena**
Middle Initial	**M.**
Last Name	**Tariq**
Citizenship Status	**U. S. Citizen**
Email Address	**amtariq@uchicago.edu**
Address	**Address** Street **5454 S. Shore Dr. #921** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**9727427820**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2020**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Fahey, Bridget
bfahey@uchicago.edu
720-272-0844

Peterson, Farah
fpeterson@uchicago.edu
773-702-9494

Casey, Anthony
ajcasey@uchicago.edu
773-702-9578

References

Lior Strahilevitz, Sidley Austin Professor of Law, University of Chicago Law School, lior@uchicago.edu, (773) 834-8665;
Alison LaCroix, Robert Newton Reid Professor of Law, University of Chicago Law School, lacroix@uchicago.edu, (773) 834-7687;
Michael Morse, Incoming Assistant Professor of Law, University of Pennsylvania Carey Law School, morsem@law.upenn.edu, (954) 558-7989

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ALEENA M. TARIQ
12 Armstrong Dr., Frisco, TX 75034 | 5454 South Shore Dr. #921, Chicago, IL 60615
amtariq@uchicago.edu | (972) 742-7820

June 23, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Blvd., Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024 term. As an aspiring litigator, I hope to collaborate as a team with you and other clerks to contribute to your chambers, as well as learn about appellate advocacy and adjudication. I am particularly interested in your chambers because of your background in public service as Executive Assistant United States Attorney for the Eastern District of Michigan.

As a clerk, my contributions include a diligent work ethic and the ability to pick up unfamiliar concepts quickly. As the Executive Articles Editor of *The University of Chicago Law Review*, I have developed skills in managing a fast-moving workload and learning unfamiliar legal concepts on a rapid learning curve. I manage a team of eight Articles Editors and oversee the process of selecting articles for publication, reading twelve to fifteen academic articles per week and evaluating their quality of style and contribution to their field. As a research assistant for Professor Farah Peterson, I evaluated complex and dated historical archival sources to construct a broader understanding of late nineteenth-century white supremacist reactions to the Reconstruction Amendments.

I am also a motivated self-starter, a collaborative team-player, and able to handle projects on multiple timelines. Before law school, I worked in the United States Federal Trade Commission's Office of Project Management as a paralegal specialist, managing incoming projects on short- and long-term timelines to improve agency operations. I worked with a team, both within my immediate project management office and beyond it, to propose and implement improvements to internal communications, on- and off-boarding systems, and the Administrative Manual of the agency. This work experience allowed me to gain skills in project management, problem solving, and performance tracking.

Enclosed for your review are my resume, transcript, writing samples, information for references from Professors Lior Strahilevitz, Alison LaCroix, and Michael Morse, and letters of recommendation from Professors Anthony Casey, Bridget A. Fahey, and Farah Peterson. Should you require additional information, please do not hesitate to let me know. Thank you for your time and consideration.

Sincerely,

/s/ Aleena Tariq

Aleena Tariq

ALEENA M. TARIQ
12 Armstrong Dr., Frisco, TX 75034 | 5454 South Shore Dr. #921, Chicago, IL 60615
amtariq@uchicago.edu | (972) 742-7820

EDUCATION

The University of Chicago Law School, Chicago, IL
Juris Doctor, Expected June 2024
Journal: *The University of Chicago Law Review* (Executive Articles Editor, Volume 91)
Activities: Muslim Law Students Association (Vice President), South Asian Law Students Association (Secretary), Labor & Employment Law Society (Co-President), Student Admissions Committee, Student Interview Committee

The University of Chicago, Chicago, IL
Bachelor of Arts with Honors, Sociology & Public Policy Studies (Urban and Environmental Policy), June 2020
Thesis: Many Hands Make Heavy Work: Dilemmas of Coalition-Building in Chicago's Environmental Justice Movement
Activities: Model United Nations of the University of Chicago (Under-Secretary-General for the General Assembly), Alpha Omicron Pi Women's Fraternity (Vice President of Academic Development)

PROFESSIONAL EXPERIENCE

Sidley Austin LLP, Chicago, IL
Summer Associate, May 2023–Present

Chicago Volunteer Legal Services, Chicago, IL
Student Intake Fellow, September 2022–Present
- Conduct intake interviews of low-income Chicago residents unable to afford counsel and connect clients with legal representation and resources

University of Chicago Law School, Chicago, IL
Orientation Leader, September 2022
- Led 32 incoming first-year law students through orientation activities, connected students with Law School resources, and answered academic and student life questions

McDermott Will & Emery LLP, Chicago, IL
1L Diversity Summer Associate, May 2022–July 2022
- Drafted Fourth Circuit brief on client's intervention into ongoing litigation on motion to compel arbitration
- Led document review of Spanish-language documents in large-scale internal harassment investigation
- Researched labor and employment transactions and litigation, including arbitration choice of law and wage and hour class certification

University of Chicago Law School, Chicago, IL
Research Assistant to Professor Farah Peterson, December 2021–February 2022
- Collected sources on nineteenth-century white supremacist violence in response to constitutional reform
- Examined and recorded eighteenth-century newspaper sources to synthesize public opinion about excise taxes

United States Federal Trade Commission, Washington, DC
Paralegal Specialist, Office of the Executive Director, October 2020–July 2021
- Proposed and implemented improvements to agency-wide internal communications program
- Researched inter-agency policy to improve Executive Director's Administrative Manual
- Wrote and distributed daily agency-wide newsletter covering internal operations to over 1,000 attorneys and staff

Office of College Admissions, University of Chicago, Chicago, IL
Student Operations Assistant, February 2018–June 2020
- Completed variety of projects to assist operations of Undergraduate Admissions Office, including staffing admissions events and maintaining online enrollment management database

LANGUAGES & INTERESTS

Languages: Urdu (native), Spanish (intermediate proficiency)
Interests: Art museums, intergenerational novels, the *New York Times* Mini-Crossword